Will Women Survive at Law Firms?

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DEVELOPMENTS IN PAY EQUITY / EQUAL PAY LAW

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DEVELOPMENTS IN PAY EQUITY/EQUAL PAY LAW*

Equal pay has moved to the forefront of regulatory, political, shareholder, employee and public concern.[1] With the recent unprecedented wave of legislation and initiatives enacted in the U.S. and abroad to address the gender pay gap, it is easier than ever before for employees and government agencies to bring pay claims against employers - exposing employers across all industries to public scrutiny and increased litigation costs and risks.

This paper will address several emerging issues in the equal pay landscape. Sections I and II discuss federal equal pay laws as well as new equal pay laws in several states that impose greater burdens on employers to justify pay differences and new laws that limit employers' ability to use prior salary in determining starting salaries for new employees. Section III provides an overview of current pay audit practices and regulatory initiatives by the Office of Federal Contract Compliance Programs ("OFCCP") that will impact federal contractors as well as initiatives of the Equal Employment Opportunity Commission ("EEOC"). Section IV addresses the continuing wave of shareholder proposals, which if passed, would require companies to disclose publicly the percentage "pay gap" between male and female employees. Finally, Section V discusses the nuances of pay audits, including issues surrounding preservation of privilege and considerations that inform remedial steps such as pay adjustments.

I. FEDERAL EQUAL PAY LAWS

A. Equal Pay Act

The Equal Pay Act ("Equal Pay Act" or "EPA") requires an employer to provide equal pay to men and women who perform equal work. Congress passed the Equal Pay Act in 1963, which amended the Fair Labor Standards Act, 29 U.S.C. § 206(d). Congress's intent in passing the Act was to "insure, where men and women are doing the same job under the same working conditions that they will receive the same pay."[2] "Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are

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[1] It is important to distinguish between "pay equity" – equal pay for equal (or, depending upon the jurisdiction, "substantially similar") work – and the oft-cited "pay gap." For purposes of this paper, the "pay gap" between men and women (frequently cited nationally as women in the United States making eighty cents for every dollar men make) is understood as a simple ratio of median earnings among male full-time workers compared to female full-time workers. *See* U.S. CENSUS BUREAU, HISTORICAL INCOME TABLE P-40: WOMEN'S EARNINGS AS A PERCENTAGE OF MEN'S EARNINGS BY RACE AND HISPANIC ORIGIN (2017), https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-people.html. Employers sometimes refer to their own company's "pay gap," typically meaning a comparison of the median earnings of men and women company-wide. These "pay gap" statistics do not compare similarly situated employees or control for other meaningful factors, such as company position or unpaid leaves. While this paper discusses both concepts, the primary focus is on "pay equity," meaning a determination of whether comparable employees are paid equitably based on their work, irrespective of gender.

[2] 109 Cong. Rec. 9196 (1963).

*The author would like to thank Michael Disotell, an associate at Orrick, Herrington & Sutcliffe LLP, for assistance in preparing this paper.

performed under similar working conditions within the same establishment."[3] Although federal legislation seeking to overhaul the existing national equal pay regime was regularly introduced throughout the Obama Administration and most recently under the Trump Administration, no bill garnered sufficient support to pass both chambers.[4]

A plaintiff seeking to prove an EPA violation must show that: (1) employees of the opposite sex are paid different wages; (2) the employees perform equal work in jobs that require equal skill, effort and responsibility; and (3) the jobs are carried out under similar working conditions.[5] When looking at comparators, the EPA keeps the analysis limited to the "same establishment."[6] If a *prima facie* EPA claim is established, the employer then has an opportunity to assert one of four statutorily-recognized affirmative defenses, by showing that the wage discrepancy is justified because it is based on: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential "based on any other factor other than sex."[7] If an employer sets forth evidence proving an affirmative defense, the burden then shifts back to the plaintiff to show that the employer's proffered reasons are actually a pretext for sex discrimination.[8]

An individual may file a charge under the EPA with the EEOC, but there is no requirement to exhaust administrative remedies before the EEOC and filing a claim with the EEOC does not toll the statute of limitations for bringing the action in court.[9] A plaintiff must file her claim under the EPA

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3 *See, e.g.*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, "Facts About Equal Pay and Compensation Discrimination," (last visited July 9, 2018), *available at* https://www.eeoc.gov/eeoc/publications/fs-epa.cfm.

4 For example, in September 2015, U.S. Sen. Kelly Ayotte (R-N.H.) introduced a bill titled the "Gender Advancement in Pay Act," which would: (1) require equal pay among men and women without reducing the opportunity for merit rewards; (2) require employers to prove there is "a business-related factor other than sex" for differences in pay (as opposed to "any factor other than sex" as under current law); (3) prohibit retaliation against employees for discussing (or not discussing) their pay information; and (4) create civil penalties for employers that willfully engage in sex-based pay discrimination. *See, e.g.*, U.S. SENATE BILL NO. 2070, "GAP Act," (Sept. 22, 2015), *available at* https://www.congress.gov/bill/114th-congress/senate-bill/2070/text. U.S. Rep. Eleanor Homes Norton (D-DC) introduced a bill in April 2017 that would amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin. U.S. HOUSE OF REPRESENTATIVES BILL NO. 2095, "Fair Pay Act of 2017," (Apr. 14, 2017), *available at* https://www.congress.gov/bill/115th-congress/house-bill/2095/text. The bill was referred to the House Committee on Education and the Workforce, but no further action has been taken.

5 *See* 29 U.S.C. § 206(d)(1); *see also Ryduchowski v. Port Authority of New York and New Jersey*, 203 F.3d 135 (2d Cir. 2000).

6 Generally, the EPA regulations define an establishment as a distinct physical place of business, rather than an entire enterprise that might have several separate places of business. 29 C.F.R. § 1620.9.

7 *See* 29 U.S.C. § 206(d)(1).

8 *Id.*

9 29 U.S.C. § 216(b).

within two years (or three years where there is a willful violation) of the alleged violation.[10] A plaintiff may file her claim individually or as a collective action.

B. Title VII

Title VII of the Civil Rights Act of 1964 (Title VII)[11] serves as the cornerstone for anti-discrimination protection within the workplace. When it was passed, the statute specifically prohibited employment discrimination on the basis of race, color, national origin, religion, and sex. It also proscribed retaliation against individuals who challenged discriminatory workplace practices prohibited by Title VII. These protections have been extended over the years to bar discrimination on the basis of age, pregnancy, disability, and genetic information as well.

Title VII contains broader protections against gender discrimination in the workplace than does the EPA. It not only prohibits pay discrimination, like the EPA, but also prohibits discrimination on any other terms or conditions of employment. In addition, Title VII offers multiple theories of liability. To encourage consistent interpretation of Title VII and the EPA's prohibition of sex-based compensation discrimination, however, employers defending compensation claims in sex discrimination cases under Title VII may take advantage of the affirmative defenses available under the EPA, in addition to any other defenses available under Title VII.[12]

Generally, Title VII disparate treatment claims are analyzed under the burden-shifting rules of *McDonnell Douglas*.[13] "Under *McDonnell Douglas*, a plaintiff must first make out a *prima facie* case, *i.e.*, she must demonstrate the following: (1) she was within the protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination."[14] "Once the prima facie case has been shown, the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for the adverse employment action."[15] "The burden then shifts back to the plaintiff to show that [the defendant's] stated reason for [the adverse employment action] was in fact pretext."[16]

In addition to or in the place of a disparate treatment claim, a plaintiff may use a disparate impact theory of liability to bring a claim under Title VII. Here, the plaintiff must identify a neutral policy or practice that has a disproportionately harmful effect on a protected class, *i.e.*, women.[17] The burden of persuasion then shifts to the employer to show that the policy or practice causing the pay discrepancy is

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[10] 29 U.S.C. § 255(a).

[11] 42 U.S.C. § 2000e *et seq.*

[12] 42 U.S.C. § 2000e-2(h).

[13] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

[14] *United States v. Brennan*, 650 F.3d 65, 93 (2d Cir. 2011) (internal quotations omitted).

[15] *Id.*

[16] *Id.*

[17] 42 U.S.C. § 2000e-2(k); *see also Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

"job related for the position in question and consistent with business necessity."[18] If the employer meets this burden, the plaintiff may still prevail if she shows that an alternative employment practice has less disparate impact and would also serve the employer's legitimate business interest.[19]

An individual must file a charge with the EEOC within 300/180 days (depending on whether or not the practice occurred in a deferral state) after the alleged unlawful practice occurred.[20] The plaintiff must commence a civil action within 90 days after the EEOC notifies the individuals of their right to sue.[21] A plaintiff may file her claim individually or as a class action.[22]

C. Litigation Trends Over Equal Pay

Private litigants have heightened the focus on equal pay through a proliferation of compensation discrimination lawsuits under both Title VII and the EPA as well as state law analogs, discussed in more detail below in Section II. Putative class action suits were filed in New York in 2016 against the New York Times and Bank of America, alleging compensation discrimination against women in reporting and managing director positions, respectively.[23] Over the past two years, suits have also been filed in California against Qualcomm[24] as well as against the law firms Sedgwick (now defunct),[25] Steptoe &

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[18] *Id*.

[19] *Id*.

[20] 42 U.S.C. § 2000e-5(e). As a result of the Lilly Ledbetter Fair Pay Act of 2009, each time an employee receives a paycheck that stems from a discriminatory pay practice or policy, a new limitations period begins to run. 42 U.S.C. § 2000e-5(e)(3).

[21] 42 U.S.C. § 2000e-5(f)(1).

[22] *See, e.g.*, Fed. R. Civ. P. 23 (governing opt-out class action mechanism).

[23] *See Grant v. New York Times Co.*, No. 1:16-cv-03175, 2016 WL 1723132 (S.D.N.Y. Apr. 28, 2016); *Messina v. Bank of America Corp.*, No. 1:16-cv-03653, 2016 WL 2864870 (S.D.N.Y. May 16, 2016). In *Grant*, the court granted the employer's motion to dismiss the individual plaintiff's federal EPA and Title VII gender discrimination claims, finding insufficient allegations of appropriate, better-compensated comparators, but denied the motion to strike class allegations. *Messina*, by contrast, was dismissed with prejudice just four months after filing.

[24] *See Pan v. Qualcomm, Inc.*, No. 3:16-CV-01885, 2016 WL 8540185 (S.D. Cal. July 25, 2016). Qualcomm ultimately settled the case for $19.5 million in monetary relief and $4 million in other forms of programmatic relief, discussed *infra*. *See Pan v. Qualcomm Inc.*, No. 16-CV-01885-JLS-DHB, 2017 WL 3252212, at *3 (S.D. Cal. July 31, 2017) (final order approving settlement).

[25] *See Ribeiro v. Sedgwick LLP*, No. CGC-16-553231, 2016 WL 4010993 (Cal. Super. Ct. San Francisco County July 26, 2016), *motion to compel arbitration after removal granted*, No. C 16-04507, 2016 WL 6473238 (N.D. Cal. Nov. 2, 2016). The parties eventually settled the claims for an undisclosed amount. *See* Melissa Daniels, "Sedgwick Partner Settles In Gender Discrimination Suit," LAW360 (June 23, 2017), https://www.law360.com/articles/938092/sedgwick-partner-settles-in-gender-discrimination-suit.

Johnson LLP,[26] Ogletree Deakins,[27] Morrison & Foerster,[28] and Jones Day.[29] Most recently, a California court overruled a second demurrer allowing a putative class of at least 5,000 women to move forward with their claims against Google, after plaintiffs had adequately revised their complaint to allege a common practice of pay discrimination at the company.[30] The amended complaint alleges that Google pays women less than men for the same work, essentially by channeling women into lower paying jobs, salary levels and job ladders, in violation of the EPA and state laws.[31]

Companies can expect not only more equal pay litigation, but also more detailed demands for programmatic injunctive relief in systemic cases. In *Pan v. Qualcomm, Inc.*,[32] for example, the parties agreed to programmatic relief worth an estimated four million dollars that included, among other things, appointing a compliance officer responsible for monitoring the settlement agreement. The settlement further required the employer to retain two industrial/organizational psychology consultants to assess policies and practices and implement changes, and to conduct annual statistical analyses of compensation.[33] Similarly, the settlement in *Coates v. Farmers Insurance Group*[34] required the employer

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[26] *See Houck v. Steptoe & Johnson LLP*, No. 2:17-cv-04595, 2017 WL 2791115 (C.D. Cal. June 22, 2017). On May 31, 2018, the court dismissed the case without prejudice and referred the dispute to individual arbitration. *See* Order Dismissing Action and referring Dispute to Individual Arbitration, No. 2:17-cv-04595 (May 31, 2018) ECF No. 59.

[27] *See Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, No. 3:18-cv-00303, 2018 WL 416522 (N.D. Cal. Jan. 12, 2018). Ogletree has moved to transfer venue in both suits from the Northern District of California to the Central District, claiming that Knepper engaged in forum-shopping. Knepper claims she is concerned that because she regularly defends employers in the Central District, her clients might see her plaintiff-side case as adverse to their interests. Ryan Boysen, *Ogletree Says Atty In Gender Bias Suit Is Forum Shopping*, LAW360 (June 8, 2018 10:52 PM), https://www.law360.com/articles/1051772/ogletree-says-atty-in-gender-bias-suit-is-forum-shopping.

[28] Complaint, *Doe v. Morrison & Foerster, LLP*, No. 3:18-cv-02542, 2018 WL 2002994 (N.D. Cal. Apr. 30, 2018).

[29] Complaint, *Moore v. Jones Day*, No. CGC-18-567391 (Cal. Super. Ct. June 19, 2018), https://www.documentcloud.org/documents/4524034-Moore-v-Jones-Day-Complaint.html.

[30] *See* Cara Bayles, "Google Can't Nix Class Claims From Gender Pay Gap Suit," LAW360 (March 26, 2018), https://www.law360.com/employment/articles/1026240/google-can-t-nix-class-claims-from-gender-pay-gap-suit.

[31] *See* RJ Vogt, "Google Workers Take 2nd Shot At Gender Pay Class Action," LAW360 (Jan. 3, 2018), https://www.law360.com/articles/998623?scroll=1.

[32] No. 16-CV-01885-JLS-DHB, 2016 WL 9024896 (S.D. Cal. Dec. 5, 2016).

[33] Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Settlement, *Pan v. Qualcomm, Inc.*, No. 3:16-CV-01885-JLS-DHB, 2016 WL 6662241, at *12 (S.D. Cal. July 26, 2016).

[34] No. 15-CV-01913-LHK, 2016 WL 5791413 (N.D. Cal. 2016)

to conduct annual statistical analyses of compensation and eliminate any unjustified adverse impacts revealed.[35]

In addition, employers must reconcile state and local litigation trends with existing and emerging federal law. The Ninth Circuit in *Rizo v. Yovino*[36] examined affirmative defenses under the federal EPA, in particular whether reliance on prior salary was a legitimate justification. A panel decision concluded that an employer may rely on prior salary information as an affirmative defense to claims under the EPA if "it show[s] that the factor 'effectuate[s] some business policy' and that the employer 'use[s] the factor reasonably in light of the employer's stated purpose as well as other practices.'" An *en banc* Ninth Circuit has now reversed the panel's prior opinion.[37]

In *Rizo*, the Fresno County school district ("County") employed plaintiff Aileen Rizo as a math consultant. In 2012, she learned that the County paid a recently hired male math consultant a higher salary than her, and she soon discovered that the County paid other male math consultants more than her, too. When she complained, the County explained that it determined all starting salaries for teachers based on the person's most recent prior salary plus an automatic five percent increase.

Rizo alleged the policy resulted in impermissible sex discrimination under the EPA. The County conceded that Rizo was in fact paid less than men doing the same job, and thus did not challenge whether she had satisfied the exacting "equal work" standard of the EPA. Nonetheless, it moved for summary judgment on the grounds that the pay differential was based a "factor other than sex," *i.e.*, Rizo and her male comparator's prior salaries, and thus was permissible under the EPA. The County asserted four business reasons for following the standard operating procedure that relied on prior pay: (1) it was objective; (2) it encouraged candidates to leave their current jobs for employment with the County; (3) it prevented favoritism and encouraged consistency in its application; and (4) it was a "judicious use of taxpayer dollars." The district court denied the County's motion, holding that prior pay does not qualify as a factor other than sex under the EPA because it can perpetuate a discriminatory wage disparity between men and women. It certified an interlocutory appeal on the question of whether "as a matter of law under the EPA, 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary."

On appeal, a panel of Ninth Circuit reaffirmed its previous 1982 decision, *Kouba v. Allstate*, and held that an employer may rely on prior salary if it "show[s] that the factor 'effectuate[s] some business policy'" and that the employer "use[s] the factor reasonably in light of the employer's stated purpose as well as other practices.'" The full Ninth Circuit in turn granted *en banc* review. In its *en banc* decision – written by the late Judge Reinhardt – the Ninth Circuit overruled *Kouba v. Allstate* and rejected the County's defense. In his opinion, Judge Reinhardt wrote: "The question before us is … simple: can an

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[35] *See* Notice of Motion and Unopposed Motion for Preliminary Approval of Class/Collective Action Settlement; Memorandum of Points and Authorities at 13, *Coates v. Farmers Insurance Group*, No. 15-CV-01913-LHK (N.D. Cal. Apr. 13, 2016) (No. 126).

[36] 854 F.3d 1161, 1165 (9th Cir. 2017) (citing *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876–77 (9th Cir. 1982)).

[37] *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *petition for cert. filed*, *Yovino v. Rizo* (U.S. August 30, 2018) (No. 18-272).

employer justify a wage differential between male and female employees by relying on prior salary? ... Based on the text, history and purpose of the Equal Pay Act, the answer is clear: No." Judge Reinhardt reasoned that "[t]o hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands." Instead, the Ninth Circuit concluded that the "factor other than sex" defense is limited to "legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance."

Of note, however, the majority appeared to cabin its holding to the facts of the case before it, in which the County had an express policy of relying on prior salary across the board. For example, the court expressly declined to offer any opinion on "whether or under what circumstances, past salary may play a role in the course of an ***individualized*** salary negotiation." The Ninth Circuit's decision is thus silent on the viability of the "factor other than sex" defense where, for example, an applicant volunteers his or her prior salary in negotiating for starting pay, or an individual applicant's prior pay is discussed in the context of how it reflects the skills and abilities that he or she brings to the position.

Other Circuits have also tightened the reigns on EPA affirmative defenses, undercutting the use of prior salary and, to some extent, prior experience as a basis for justifying wage disparities. The Eleventh Circuit, in *Bowen v. Manheim Remarketing, Inc.*,[38] reversed summary judgment and allowed plaintiff's claim to proceed to trial finding that a reasonable jury could find that the employer had not established its affirmative defense to plaintiff's EPA claim. Where the plaintiff alleged that her employer paid her less because of her gender, the court found that a jury could find that "prior salary and prior experience *alone* do not explain [the employer's] disparate approach to [plaintiff's] salary over time."[39] To assert the affirmative defense, an employer must show that the factor of sex provided "no basis for the wage differential."[40] In this case, a jury could find that sex played a role where the employer paid the male predecessor a much greater starting salary near the midpoint of the compensation range, while it set plaintiff's salary at the bottom of the range. Further, once plaintiff established herself as an effective arbitration manager, "prior salary and prior experience would not seem to justify treating her different than the predecessor."[41] Finally, plaintiff produced evidence that managers at the employer were influenced by sex bias, taking sex into account when considering other personnel matters.

In addition, in *U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin.*,[42] the Fourth Circuit found that the appropriate standard for asserting the fourth affirmative defense under the EPA is not whether factors other than sex *might* explain the wage disparity, but whether factors other than sex were *in fact* the reason for the disparity. Here, the Maryland Insurance Agency ("MIA") attempted to establish that the wage disparity between male and female fraud investigators resulted from the state salary schedule as well as from the comparators' experience and qualifications. The court held that a "jury would not be compelled to find that the reasons proffered by MIA were, *in fact*, the reasons for the

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38 882 F.3d 1358, 1364 (11th Cir. 2018).

39 *Id*. (emphasis added).

40 *Id*. at 1362.

41 *Id*. at 1363.

42 879 F.3d 114, 124 (4th Cir. 2018).

disparity in pay awarded to the claimants and the comparators."[43] For example, while applying a neutral salary schedule, the employer exercises discretion to assign a new hire to a specific step and salary range. Further, this discretion takes into account prior state employment, prior experience and qualifications. Hence, where gender-neutral factors could explain a wage disparity, the affirmative defense requires that the evidences establishes that such factors *in fact* explained such disparity.

II. STATE EQUAL PAY LAWS

Beyond the protections provided and enforced under the EPA, numerous states have adopted laws that supplement and augment those protections. However, as discussed in more detail below, seven states – California, New York, Maryland, Massachusetts, Oregon, New Jersey, and Washington – have passed particularly stringent equal pay laws that significantly increase the burdens on employers to justify pay disparities. Following suit, additional states have proposed and/or adopted more piecemeal policies – such as Nevada – addressing equal pay concerns, but on a significantly lesser scale than the seven states mentioned above.

Several other state governments have begun to advance similar equal pay legislation, often citing the positive impact of wage equality on workplace dynamics. To date, over two dozen other states have introduced legislation seeking to address the concerns regarding the use of salary history.

A. California

Effective January 1, 2016, California amended its equal pay legislation through the California Fair Pay Act ("FPA") to include more employee-friendly provisions.[44] It was modeled after the federal Paycheck Fairness Act,[45] which has been repeatedly introduced but never passed in Congress for over twenty years. In September 2016, California again amended its equal pay regime to incorporate identical protections against discrimination on the basis of race and ethnicity.[46]

The most important aspect of the FPA is that it changes the standard from "equal pay for equal work" (which remains the standard under the EPA) to "equal pay for substantially similar work" based on a composite of the employee's skill, effort, and responsibility, performed under similar working conditions. The California Department of Industrial Relations has defined the terms of the new standard:

> "Substantially similar work" refers to work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions. Skill refers to the experience, ability, education, and training required to perform the job. Effort refers to the amount of physical or

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[43] *Id*. (emphasis added).

[44] *See, e.g.*, CALIFORNIA SENATE BILL NO. 358, "Conditions of employment; gender wage differential," (Oct. 6, 2015), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB358; *see also* CALIFORNIA LAB. CODE § 1197.5.

[45] *See, e.g.*, U.S. SENATE BILL NO. 84, "Paycheck Fairness Act," (Jan. 23, 2013), *available at* https://www.congress.gov/bill/113th-congress/senate-bill/84.

[46] CALIFORNIA LAB. CODE § 1197.5(b).

> mental exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required in performing the job. Working conditions has been interpreted to mean the physical surroundings (temperature, fumes, ventilation) and hazards.[47]

No court or administrative agency, however, has yet applied this guidance.

The original version of the FPA would have changed the "equal work" standard to "comparable work," further enlarging the pool of possible comparators. However, the bill was revised based on input from various opponents to the standard, particularly the California Chamber of Commerce, which argued that "trying to determine 'comparable' work for different job duties can be extremely subjective, leading to different interpretations and thus the potential for litigation." The Chamber proposed the "substantially similar" standard because it is the standard used under the regulations interpreting federal law, and California courts generally rely on the federal regulations to interpret the California Act since no equivalent state regulations exist. The California Assembly's Judiciary Committee bill analysis also explains that the "substantially similar" standard is designed to prevent employers from arguing "that the jobs performed by persons of opposite sex were not 'equal' in every way."

Like the EPA, the FPA affords employers four affirmative defenses to justify pay disparities: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex.[48] The new law offers a non-exhaustive list of factors that could fall under the "bona fide factor other than sex" defense (such as "education, training, or experience"). Employers must demonstrate that unequal pay is based on one of these factors, that is reasonably applied and accounts for the entire pay difference.[49] The FPA fails to define "reasonable" and places the burden on the employer to demonstrate that a factor is: (1) not based on a sex-based differential in compensation; (2) job-related to the position in question; and (3) consistent with a business necessity.[50] The burden then shifts back to the employee to revive the claim if he or she demonstrates that an alternative business practice exists that would serve the same purpose without producing wage disparity. Finally, the FPA no longer requires comparator wages to be from "the same establishment."

The change from "comparable" to "substantially similar" undoubtedly improved the bill, which is one of the key reasons that the Chamber eventually supported it. Nevertheless, the FPA is vague and ambiguous, raising many issues and the increased potential for litigation. In particular, the updated burden of proof is perhaps the ripest area for interpretive disputes. While the new burden-shifting framework for the "bona fide factor other than sex" defense arguably tracks Title VII, it leaves open many questions about when and whether any given compensation decision will be "job-related" or "consistent with business necessity." Specifically, it is unclear to what extent employers will be able to structure wages according "to the market" and consider factors such as the overall supply of talented workers, the potential existence of other competitive offers of employment, and prior employee salary. As discussed

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47 California Equal Pay Act: Frequently Asked Questions, STATE OF CAL. DEP'T OF INDUS. RELATIONS (Oct. 2017), https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm.

48 *Id*.

49 CALIFORNIA LAB. CODE § 1197.5(a)(2)-(3).

50 CALIFORNIA LAB. CODE § 1197.5(a)(1)(D).

further below, the amended FPA also contains a provision limiting the ability of employers to rely exclusively on prior salary to justify a disparity in compensation.

The California Senate Judiciary Committee's bill analysis suggests that the law is intended to target, among other things, "the practice of basing a starting salary on the employee's prior salary" and the "inherently gender-biased" nature of the job market. Proponents of the law argue that "employers should have control over the way they determine wages, and the employers should be choosing methods that do not have intentional or inherent wage discrimination." The FPA increases the burden on employers when defending wage decisions based on factors such as market conditions, the employer's financial circumstance, or the need to offer a raise to retain a given worker at a given moment. Practically speaking, the FPA may also complicate moving for summary judgment, as most circumstances will involve intricate factual disputes as to whether the employer's decisions were "job related" and "consistent with business necessity." Such a determination is increasingly important in the wake of a FPA amendment regarding employer salary history inquiries, as described in greater detail in Section II.G.1.

These changes may ultimately leave more discretion in the hands of judges and juries to determine what attributes employers should value in their employees as they make pay and promotion decisions. But there is much more to pay and promotion decisions than meets the eye, and values differ from industry to industry, employer to employer, job to job and employee to employee. Each case will present new challenges for fact finders as they try to determine whether pay disparities arise from discrimination.

The FPA also includes enhanced anti-retaliation provisions intended to improve transparency about employees' salaries and provides that employers may not retaliate against employees who discuss their own wages, others' wages, or seek information about another employee's salary.[51] The FPA not only states that employers may not prohibit employees from discussing their own or others' wages, it also creates a private right of action for employees who claim retaliation.[52]

B. New York

Effective January 19, 2016, New York enacted a group of eight bills, referred to as the Women's Equality Agenda, which expand protections for women in the workplace and elsewhere in the state. A significant part of this legislative "agenda," the Achieve Pay Equity (APE)[53] law makes several important amendments to the state's equal pay law, which, until now, closely tracked the EPA.[54] Under prior law,

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51 CALIFORNIA LAB. CODE § 1197.5(a)(3).

52 *Id.* § 1197.5(k).

53 NEW YORK SENATE BILL NO. 1, "Prohibits differential pay because of sex," (Oct. 21, 2015), *available at* https://www.nysenate.gov/legislation/bills/2015/s1; *see also*, NEW YORK LAB. LAW § 194(1).

54 *See, e.g.*, Jill Rosenberg, "New York State Expands Equal Pay Law and Other Workplace Protections for Women," ORRICK EMP'T LAW AND LITIG. BLOG, (Oct. 26, 2015), *available at* http://blogs.orrick.com/employment/2015/10/26/new-york-state-expands-equal-pay-law-and-other-

employers were required to provide equal pay to men and women in the "same establishment" for "equal work," defined as work requiring "equal skill, effort and responsibility" and "performed under similar working conditions."

The law broadens the meaning of "same establishment" by defining it to include workplaces located in the "same geographic region" (but no larger than a county), taking into account population distribution, economic activity and/or the presence of municipalities.[55] Thus, the comparison of employee wages may go beyond a single location, for example, two retail stores of a company in the same city or in different cities but in the same county.

APE also replaces the catch-all "any other factor other than sex" defense to a wage differential with the defense of "a bona fide factor other than sex, such as education, training, or experience." Similar to California, the new law then shifts the burden on the employer to demonstrate that the factor: (1) is not based on or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with a business necessity.[56] The new law also allows employees to rebut an employer's defense with evidence that an employment practice has a sex-based disparate *impact*, that an alternative practice that serves the same purpose without disparate impact is available, and that the employer has refused to adopt such a practice.

In addition, the law provides that employers may not prohibit employees from inquiring about, discussing or disclosing their own or other employees' wages.[57] Unlike California, however, New York states that employers "may, in a written policy provided to all employees, establish reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages," although such limitations must be consistent with state and federal law, and "may include prohibiting an employee from discussing or disclosing the wages of another employee without such employee's prior permission."[58] Employers must also comply with New York Department of Labor regulations that state that time, place, and manner limitations may not be so restrictive as to "unreasonably or effectively preclude[] or prevent[] inquiry, discussion, or disclosure of wages," and must be content-neutral, narrowly tailored, and "leave open ample alternative channels for the communication of information."[59] Unlike California, the New York law contains a provision denying protection in some circumstances to employees with job duties affording access to other employees' compensation.[60]

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workplace-protections-for-women/ (further information and analysis regarding the scope and import of the New York law).

55 N.Y. LAB. LAW § 194(1), (3).

56 *Id.* § 194(1)(d).

57 *Id.* § 194(4)(a).

58 *Id.* § 194(4)(b).

59 12 NYCRR § 194-1.3 (N.Y. Dep't of Lab. Feb. 1, 2017); N.Y. COMP. CODES R. & REGS. tit. 12 § 194-1.3 (2017).

60 N.Y. LAB. LAW § 194(4)(d). The law states that it "shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee's essential job

C. Maryland

In May 2016, Maryland enacted the "Equal Pay for Equal Work Act of 2016," which took effect in October 2016. The law substantially amends Maryland's existing equal pay regime and expands the law's potential impact, most notably by including the term "gender identity" as a protected class within the state's definition of sex-based discrimination.[61]

The explicit adoption of "gender identity" represents a new development in the context of state equal pay laws, although other portions of Maryland's law mirror similar regimes at the state and federal level. For example, Maryland's law contains so-called "pay secrecy" provisions that prohibit employers from retaliating against employees for inquiries related to wages.[62] Like New York, Maryland allows employers to maintain written policies with reasonable workday limitations on the time, place, and manner for wage discussions consistent with the Commissioner of Labor and Industry's standards and other state and federal laws.[63] These provisions substantially resemble similar restrictions adopted for federal contractors by the Office of Federal Contract Compliance Programs in January 2016.[64]

Additionally, Maryland has adopted restrictions on the availability of affirmative defenses to pay disparity that are similar to provisions in New York and California. Specifically, like California (and, to a lesser extent, New York), employers in Maryland seeking to establish that an alleged pay disparity is based upon "bona fide factors" other than impermissible sexual discrimination are limited to factors that: (1) are not derived from a sex-based differential in compensation; (2) are "job-related" and "consistent with business necessity;" and (3) account for the entire pay differential at issue.[65]

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functions discloses the wages of such other employees to individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge, or in furtherance of an investigation, proceeding, hearing, or action under this chapter, including an investigation conducted by the employer." *Id.*

61 MD. CODE ANN., LAB. & EMPL. § 3-304(b).

62 *Id.* § 3-304.1. Maryland prohibits employers from taking adverse employment actions against employees who: (1) inquire about another employee's wages; (2) disclose their own wages; (3) discuss another employee's wages, if those wages have been disclosed voluntarily; (4) ask the employer to provide a reason for the employee's wages; or (5) aid or encourage another employee's exercise of rights under the Maryland law. *Id.*

63 *Id*. Additionally, Maryland does not: (1) require employees to discuss or disclose their wages; (2) diminish employees' rights to negotiate terms and conditions of employment; (3) limit an employee's rights under a collective bargaining agreement; (4) obligate employers or employees to disclose wages; (5) permit disclosure of proprietary information, trade secrets, or information that is otherwise protected by law without written consent of the employer; or (6) permit employees to disclose wage information to an employer's competitor. *Id.*

64 U.S. DEP'T OF LABOR OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, "OFCCP Final Rule Promotes Pay Transparency," (Jan. 2016), *available at* https://www.dol.gov/ofccp/PayTransparency.html.

65 MD. CODE ANN., LAB. & EMPL. § 3-304(b).

One of the more striking differences in the Maryland law is its prohibition on gender-based pay disparity for "work of comparable character or work on the same operation, in the same business or of the same type," as opposed to the "substantially similar" definition under California law (which is similar to the EPA).[66] Maryland's regime also prohibits providing "less favorable employment opportunities based on sex or gender identity," with specific references to diminished "career paths" (an ambiguous term whose application to equal pay is untested).[67]

In addition to the Equal Pay Act, Maryland also passed the Equal Pay Commission Establishment Act into law, thereby creating the Equal Pay Commission of the Maryland Division of Labor and Industry.[68] The Commission membership will be appointed by the governor of Maryland, and drawn from the Maryland business community, labor organization representatives (as nominated by labor federations), and other relevant organizations. The Commission is empowered to implement a number of different initiatives under the new law, including: (1) evaluate the extent of wage disparities in the public and private sectors; (2) establish wage data collection mechanisms with employers; (3) develop strategy to determine equal pay best practices; (4) recommend options for streamlining available administrative and legal remedies; (5) foster partnerships with private industry; and (6) share data (most specifically in an annual report to be delivered to the state government on December 15 of each year, beginning with 2017).

D. Massachusetts

In August 2016, Massachusetts enacted comprehensive equal pay legislation which took effect on July 1, 2018.[69] The Massachusetts bill follows many of the equal pay innovations in California, New York and Maryland, with several important distinctions. For example, the law adopts the "comparable work" language rejected by the California legislature, but defines that phrase to mean "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions."[70]

The bill leaves intact those compensation schemes that base employee wages on seniority, merit, quality or quantity of production, geography, education, training or experience, and travel.[71] As in other states, however, "seniority" may not be reduced for time spent on leave due to a "pregnancy-related condition" or other types of parental, family and medical leave.[72]

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66 In particular, this language mirrors proposed language that was eventually stripped from the finalized version of California's equal pay amendments.

67 *Id.* § 3-304(a).

68 *See, e.g.*, MARYLAND HOUSE BILL 1004, "Equal Pay Commission – Establishment," (May 19, 2016), *available at* http://mgaleg.maryland.gov/2016rs/chapters_noln/ch_639_hb1004t.pdf.

69 MASS. GEN. LAWS ch. 149, §§ 1 *et seq.*

70 *Id*. § 105A(a).

71 *Id*. § 105A(b).

72 *Id*.

The law does not contain the "catch-all" defense of a "bona fide factor other than sex," however, distinguishing it from California and Maryland.[73] The law expressly removes an employee's previous wage or salary history as a defense to an action regarding an identified wage differential. On the other hand, the new Massachusetts law contains a "safe harbor" that affords employers a defense against an allegation of wage discrimination if "within the previous 3 years and prior to the commencement of the action, [the employer] has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work … in accordance with that evaluation ...."[74]

Moreover, the Massachusetts law states that employers may not require, "as a condition of employment, that an employee refrain from inquiring about, discussing, or disclosing" wage information.[75] It also prohibits employers from contracting with employees to avoid pay transparency obligations, or otherwise trying to exempt themselves from the law's requirements.[76] The law does, however, permit employers to prohibit employees who have access to the pay data of others due to their job responsibilities from disclosing other employees' compensation information without first obtaining the other employee's permission.[77] Employers are not required to disclose employee wages to any third party.[78]

As in Maryland, the Massachusetts law creates a special commission to aid in its enforcement. By January 1, 2019, the commission is tasked with submitting a report to the legislature that will evaluate "the factors, causes and impact of pay disparity" based on, among other protected statuses, gender identity, sexual orientation, and disability status.[79] While the bill does not describe a role for the commission beyond this initial reporting duty, the focus on pay disparity with respect to other diverse groups signals a possible new frontier in equal pay initiatives; several states and municipalities, including Iowa, already prohibit wage discrimination on these bases.[80] Massachusetts has also led the charge in creating the first truly comprehensive state law on salary history discrimination, discussed further in Section II.G.1.

E. Oregon

The Oregon Equal Pay Act of 2017 was signed by Governor Kate Brown on June 1, 2017.[81] Under the new law, the majority of which will take effect on January 1, 2019, it is unlawful for an

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73 *See generally id.*

74 *Id*. § 105A(d).

75 *Id*. § 105A(c)(1).

76 *Id*. § 105A(c).

77 *Id*.

78 *Id*. § 105A(c)(1).

79 *Id*. at ch. 151B, § 1.

80 IOWA CODE § 216.6A(b).

81 OREGON HOUSE BILL 2005, "Relating to pay equity; and prescribing an effective date," (June 1, 2017), *available at* https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/HB2005.

employer to pay wages to an employee at a rate greater than that which the employer pays employees of a protected class, for work of comparable character, the performance of which requires comparable skills.[82] This is a change from Oregon's previous law, which prohibited the payment of wages to any employee at a rate less than that at which the employer paid wages to employees of the opposite sex. Thus, the new law uses the term "protected class" whereas the old law only covered differences based on gender. With that, the law expands its reach to prohibit wage disparities on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age.[83]

While the bill does take steps to eliminate pay disparities based on discrimination, it does not prohibit all disparities in salary. Rather, the bill provides for exceptions if the difference is based on a bona fide factor such as a seniority system, a merit system, workplace locations, travel, education, training, experience, or a combination of factors.[84] Therefore, while the law aims to combat discriminatory differences in salary, it recognizes several valid, non-discriminatory reasons for some pay disparities.

In addition, the Oregon law, like the law in Massachusetts, includes a "safe harbor" that allows employers to limit potential backpay awards if they can demonstrate that they: (1) completed a good-faith equal pay analysis reasonable in detail and scope within three years before the date the employee filed the action; (2) eliminated the plaintiff's wage differential; and (3) took reasonable and substantial steps to end pay differentials for the plaintiff's protected class.[85] If the employer proves this defense, the court may only award a prevailing plaintiff back pay for the two years immediately preceding filing the lawsuit and costs and reasonable attorneys' fees.[86] In such cases, neither compensatory nor punitive damages can be awarded.[87]

F. New Jersey

The national proliferation of equal pay laws continued into 2018 with the addition of New Jersey. Prior to 2018, state legislators made several unsuccessful attempts to amend New Jersey's equal pay law (the NJLAD). For example, in February 2016, the New Jersey Senate passed a bill to address the gender pay gap that would require equal pay for "substantially similar" work in terms of effort, skill, and responsibility.[88] The New Jersey Assembly passed the same bill on March 14, 2016.[89] However, in early

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82 OR. REV. STAT. § 652.220(1)(b).

83 OR. REV. STAT. § 652.210(5).

84 OR. REV. STAT. § 652.220(2).

85 OREGON HOUSE BILL 2005, *supra* note 81, at § 12(1).

86 *Id*. § 12(2).

87 *Id*.

88 NEW JERSEY SENATE BILL NO. 992, "An act concerning equal pay for women and employment discrimination, requiring public contractors to report certain employment information, amending P.L.1945, c.169, and supplementing P.L.1952, c.9," (Feb. 4, 2016), *available at* http://assets.law360news.com/0791000/791513/s992%20cv.pdf.

May 2016, New Jersey Governor Chris Christie vetoed the legislation, specifically objecting to various provisions as "anti-business."[90] The inauguration of new Governor Phil Murphy, however, renewed opportunities to present new equal pay legislation, and state legislators capitalized with an extensive reform bill on March 26, 2018.[91] Governor Murphy signed the bill on April 24, 2018,[92] and it took effect as of July 1, 2018. This law, unlike many other equal pay laws that only address unequal pay based on sex, prohibits employers from providing unequal pay to employees based on any of the characteristics protected by the NJLAD.

Like many comparable state equal pay laws, the New Jersey law modifies the federal standard by prohibiting discrimination between employees performing "substantially similar" work. Similar to the California FPA and other equal pay laws, "substantially similar" work is assessed as a composite of the skill, effort, and responsibility necessary to perform that work.[93] Comparators include employees performing substantially similar work at all of the employer's operations or facilities.[94]

An employer may justify the existence of an observed wage differential by establishing the existence of: (1) a seniority-based compensation system; (2) a merit-based compensation system; or (3) each of the following criteria: (i) that the differential is based on bona fide factors other than a protected characteristic, including training, education, experience, or production factors; (ii) that the factors do not perpetuate a compensation differential based on a protected characteristics; (iii) any bona fide factor is applied reasonably; (iv) any bona fide factor accounts for the entire wage differential; and (v) any bona fide job factor is job-related and based on a legitimate business necessity.[95] Moreover, a compensation factor based on business necessity is not defensible if there is an alternative practice available that would not produce the same disparity.[96]

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89 *See, e.g.*, NEW JERSEY ASSEMBLY BILL NO. 2750, "An Act concerning equal pay for women and employment discrimination, requiring public contractors to report certain employment information," (March 14, 2016), *available at* https://legiscan.com/NJ/bill/A2750/2016.

90 *See, e.g.*, Gov. Chris Christie, "Memorandum – Senate Bill No. 992," (May 2, 2016), *available at* http://assets.law360news.com/0791000/791513/s992%20cv.pdf.

91 NEW JERSEY SENATE BILL NO. 104, "Diane B. Allen Equal Pay Act, amending P.L.1945, c.169, and supplementing P.L.1952, c.9," (March 26, 2018), *available at* https://www.csemploymentblog.com/wp-content/uploads/sites/45/2018/04/here.pdf.

92 Murphy's first official act in office was to sign an executive order targeting gender pay inequality. The Order protects public employees from wage discrimination by prohibiting state entities from inquiring about prior salary. Executive Order No. 1, http://nj.gov/infobank/eo/056murphy/pdf/EO-1.pdf.

93 NEW JERSEY SENATE BILL NO. 104, *supra* note 91, at § 11(t).

94 *Id*. at § 11(t)(5).

95 *Id*. at § 11(t)(1)-(5).

96 *Id*. at § 11(t)(5).

As amended, the NJLAD permits recovery of up to six years of back pay, and restarts the statute of limitations period with each successive non-compliant paycheck.[97] The NJLAD also curtails the use of waivers in the equal pay context by making it an unlawful act to require an employee's consent to a truncated limitations period.[98] In addition, the statute provides for treble damages for violations of the pay equity provisions.[99]

Other equal pay enhancements include prohibitions on retaliation for wage disclosures and discussions.[100] Violations of the retaliation provisions may, as for other types of pay equity violations, result in awards for treble damages.[101] The law also expands anti-retaliation protections to cover activities that include seeking legal advice and consulting with a government agency.[102]

In addition, the amended NJLAD creates unique reporting obligations for certain government contractors. Covered contractors must provide information on compensation and hours worked, further broken down by gender, race, ethnicity, and job category.[103] The general reporting requirements exclude government contractors performing "public work" (such as construction) and contractors for the sale of goods.[104] With respect to contractors performing "public work," a pending bill – the Wage Transparency Act – would require contractors' certified payroll records to include the following data points for each employee associated with a given contract: gender, race, job title, occupational category and rate of compensation.[105] In order to promote further transparency, the Wage Transparency Act would entitle employees of covered contractors to access to the reported compensation data.[106]

G. Washington

On March 21, 2018, Washington Governor Jay Inslee signed into law amendments to Washington State's Equal Pay Act, the first amendments to the statute in 75 years. Per its express text, the new law seeks "to address income disparities, employer discrimination, and retaliation practices, and to reflect the

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97 *Id*. at § 11(a).

98 *Id*. at § 11(r).

99 *Id*. at § 12.

100 *Id*. at § 11(r).

101 *Id*. at § 12.

102 *Id*. at § 11(r).

103 *Id*. at § 5.

104 *Id*.

105 NEW JERSEY ASSEMBLY BILL NO. 1825, "Wage Transparency Act, an act requiring public contractors to report certain employment information and supplementing P.L.1952, c.9 (C.34:11-56.1 et seq.)" (pre-filed for introduction in 2018), *available at* http://www.njleg.state.nj.us/2018/Bills/A2000/1825_I1.HTM.

106 *Id*. at § 2(c).

equal status of all workers in Washington state."[107] The amendments constitute a significant overhaul to Washington's equal pay law, and reflect continued momentum in state legislation that exceeds minimum federal standards. Washington's new law took effect on June 7, 2018.[108]

Prior to the enactment of H.B. 1506, which was introduced in January 2017, Washington prohibited compensation discrimination based on "sex," including with regards to promotion, where employees are "similarly employed." The new law modifies prior law and/or increases the scope of prohibited conduct in the following ways. First, the revised statute specifies that individuals are "similarly employed" if the "performance of the job requires comparable skill, effort, and responsibility, and the jobs are performed under similar working conditions."[109] Washington's new law further clarifies that job titles alone are not determinative.[110] Notably absent from the law are provisions addressing location of the work performed, in contrast with amended laws in New Jersey and elsewhere.

Second, the revised statute alters the available defenses for pay equity claims. Similar to federal law, Washington's new law provides there is no discrimination if a differential is based on a seniority system, a merit system, or a system that measures earning by quantity or quality of production.[111] Washington also recognizes a "bona fide regional difference in compensation levels."[112] Moving beyond the federal requirements, however, Washington increases the burden on the employer to prove that these defenses, or any other "bona fide job-related factor" on which the employer relies, are (1) based in good faith, (2) consistent with business necessity, (3) not based on or derived from a gender-based differential, and (4) account for the entire differential.[113] The enhanced burden is consistent with New Jersey and other recent state pay equity laws. The law also expressly clarifies that reliance an individual's prior salary is not a defense.[114]

Third, although Washington previously prohibited compensation discrimination, the new law expands protections against discrimination in terms of conduct that deprives an employee of "career advancement opportunities."[115] In this regard, Washington's equal pay law is among the nation's farthest reaching, and among the most significant departures from federal law.

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[107] WASHINGTON HOUSE BILL NO. 1506, "Addressing Workplace Practices to Achieve Gender Pay Equity," (March 21, 2018), *available at* http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Passed%20Legislature/1506-S2.PL.pdf.

[108] Washington State Legislature, Bill Information > HB 1506, "HB 1506 – 2017-18," *available at* http://apps2.leg.wa.gov/billsummary?BillNumber=1506&Year=2017&BillNumber=1506&Year=2017.

[109] R.C.W. 49.12.175 § 3(2).

[110] *Id*.

[111] *Id*. at § 3(3)(b)(i)-(iv).

[112] *Id*. at § 3(3)(b)(v).

[113] *Id*. at § 3(3)(a)(i)-(iii).

[114] *Id*. at § 3(3)(d).

[115] *Id*. at § 4(2).

Fourth, Washington's amended statute includes wage transparency provisions that mirror those incorporated into other state pay equity laws. Washington law now prohibits retaliation against employees for discussing wages[116] and for requesting the employer to provide a justification for perceived wage disparities,[117] among other conduct.

Finally, in addition to traditional civil suits, the new law also includes numerous provisions related to administrative enforcement and penalties, as governed by the Department of Labor and Industries.[118] In particular, the law authorizes employees to file complaints directly with the state Department of Labor and Industries, which is newly authorized to investigate claims and impose penalties of actual and statutory damages, as well as to award the employee's costs and fees, with a four-year reach back window.[119]

H. Nevada

Nevada's novel approach to pay equity relies on the "carrot" of potential state government contracts rather than the "stick" of potential fines or litigation. Effective January 1, 2018, Nevada will certify vendors who "pay their employees equal pay for equal work without regard to gender."[120] Nevada gives certified vendors preference in competition for state contracts and permits them to note their certification in advertising, marketing, or other promotional materials.[121] Nevada also permits companies to "self-certify" in accordance with state regulation, but contractors face debarment penalties if they make fraudulent misrepresentations.[122]

I. Salary History Laws

In addition to laws directly targeting pay inequality, several cities and states have rapidly begun to introduce legislation that forbids employers from seeking or otherwise considering a prospective employee's salary history during the recruitment and hiring process. The sudden proliferation of such legislation is guided by the belief that wage history inquiries perpetuate pay inequality throughout an individual's career, allowing past discrimination to set compensation benchmarks that follow an individual between workplaces. Though no law prohibiting salary history inquiries presently exists at the federal level, Congresswoman Eleanor Holmes Norton recently introduced H.R. 2418, the Pay Equity for

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116 *Id*. at § 5(2)(a).

117 *Id*. at § 5(2)(b).

118 *Id*. at § 7.

119 *Id*.

120 Assembly Bill No. 106, 79th Sess. (Nev. 2017). The law includes a sunset provision phasing the system out in 2021. *Id*.

121 *See id*. §§ 25, 28(6).

122 *Id*. § 24(2).

All Act of 2017,[123] which would prohibit employers from seeking "the previous wages or salary history, including benefits or other compensation, of any prospective employee from any current or former employer of such employee."

1. State Laws

Massachusetts was the first state to pass a law specifically limiting an employer's ability to inquire into an employee's salary history.[124] As of July 1, 2018, employers may only request confirmation of a prospective employee's past wages after the employee has voluntary disclosed such information, or an offer of employment with compensation has been extended. In addition to prohibiting salary inquiries generally, the act makes it an unlawful practice to "require that a prospective employee's prior wage or salary history meet certain criteria" as a condition of employment.[125]

Delaware followed suit on June 14, 2017, becoming the second state to pass salary history legislation, and, with an effective date of December 14, 2017, the first to enact such provisions into law.[126] The law prohibits employers from screening applicants based on prior salary, and from requiring that a candidate's prior salary meet a minimum or maximum amount.[127] Similarly, employers may not ask applicants about compensation history or elicit information from current or former employers.[128] However, the law explicitly does not prohibit employers and applicants from "negotiating compensation expectations" if employers do not request or require applicants' compensation histories.[129] Furthermore, employers are free to ask about compensation history after extending, and after applicants accept, offers including proposed terms of compensation.[130] Employers are not liable for conduct of any non-employee agents (e.g., recruiting firms) that employers instruct to comply with the law, even if such agents later violate it.[131] Initial violations of the statute carry civil penalties of $1,000 to $5,000, while employers are subject to penalties ranging from $5,000 to $10,000 for each subsequent violation.[132]

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123 H.R. 2418, "Pay Equity for All Act of 2017," (May 11, 2017), *available at* https://www.congress.gov/bill/115th-congress/house-bill/2418/text?q=%7B%22search%22%3A%5B%22eleanor+holmes%22%5D%7D&r=5.

124 MASS. GEN. LAWS CH. 149 § 105A(c)(2).

125 *Id*.

126 DELAWARE HOUSE BILL NO. 1, "An Act to Amend Title 19 of the Delaware Code Relating to Unlawful Employment Practices," (June 6, 2017), *available at* http://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=25599&legislationTypeId=1&docTypeId=2&legislationName=HB1.

127 DEL. CODE ANN. tit. 19 § 709B(b)(1).

128 *Id*. § 709B(b)(2).

129 *Id*. § 709B(d).

130 *Id*. § 709B(e).

131 *Id*. § 709B(c).

132 *Id*. § 709B(h).

Following a winding legislative effort, California passed a comprehensive law prohibiting salary history inquiries in September 2017. Previously, the California legislature passed A.B. 1017, a bill that would have prohibited asking job applicants about their salary histories.[133] Governor Jerry Brown vetoed the bill, explaining that it "broadly prohibits employers from obtaining relevant information with little evidence that this would assure more equitable wages." Notwithstanding Governor Brown's strong message about the relevance of prior salaries in setting pay, California Assembly Member Nora Campos introduced a slightly modified bill on January 19, 2016, that would have prohibited an employer from seeking a job applicant's prior salary history and required employers to provide a pay scale for various positions on request.[134] Although the California Legislative Women's Caucus identified the bill as one of its top priorities for the 2015-2016 legislative session,[135] the controversial language was ultimately removed.[136] However, in September 2016, California enacted a new amendment to the FPA which provides that "prior salary shall not, by itself, justify any disparity in compensation."[137] While it does not prohibit employers from requesting employees' prior salary information, the amendment does significantly undermine the utility of past compensation in current hiring decisions.

The California legislature again introduced a bill prohibiting salary history inquiries on January 17, 2017.[138] The bill passed state Senate and Assembly votes on September 12 and 14, 2017 respectively, and this time, on October 12, 2017, received the Governor's approval. The law took effect on January 1, 2018.[139] Like other comparable state laws, the California law prohibits employers from "seek[ing] salary history information" from any applicant, either directly or indirectly. Moreover, it prohibits employers from relying on salary history information in determining what salary to offer unless the applicant "voluntarily and without prompting" discloses that information – and even in that instance, consistent with the FPA, the prior salary information cannot in and of itself justify any resulting pay disparities.[140]

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133 CALIFORNIA ASSEMBLY BILL NO. 1017, "An act to add Section 432.3 to the Labor Code, relating to employers," (February 26, 2015), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1017.

134 *See, e.g.*, CALIFORNIA ASSEMBLY BILL NO. 1676, "An act to amend Section 1197.5 of the Labor Code, relating to employers," (June 15, 2016), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1676.

135 Press Release, "California Legislative Women's Caucus, Women's Caucus Announces Priority Legislation and Budget Action to Fix Outdated Infrastructure Supporting California's Women, Workforce and Economy," CALIFORNIA LEGISLATIVE WOMEN'S CAUCUS (Feb. 11, 2016), *available a*t http://womenscaucus.legislature.ca.gov/news/2016-02-11-lwc-releases-2016-budget-and-policy-priorities.

136 *See* CALIFORNIA ASSEMBLY BILL NO. 1676, *supra* note 134 (text of the bill as amended by the California Senate would now only amend the relevant California Labor Code section to state that "[p]rior salary shall not, by itself, justify any disparity in compensation").

137 CALIFORNIA LAB. CODE § 1197.5(a)(3).

138 CALIFORNIA ASSEMBLY BILL NO. 168, "Employers: salary information," (Jan. 17, 2017), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB168.

139 *Id*. § 432.3.

140 *Id*.

Finally, the new law mandates that employers furnish "the pay scale for a position" to any applicant "upon reasonable request,"[141] a feature that so far is unique to California among salary history laws.

California passed further salary history legislation on July 18, 2018, clarifying several ambiguities in the existing law.[142] The legislation also defines key terms such as "applicant" and "pay scale."[143] In addition, prior salary cannot be used to justify a pay differential between employees of different sexes, races or ethnicities, except when such compensation differentials result from a seniority system, merit system, or other bona fide factor other than sex, race or ethnicity.[144] The clarifying provisions take effect January 1, 2019.

On January 10, 2018, the California Pay Equity Task Force released draft guidance documents for employers regarding starting salary setting practices in light of these new laws, but these have not yet been formally adopted or relied upon by any court.[145]

Oregon law prohibits employers from "[s]creen[ing]" applicants based on prior compensation or "seek[ing]" salary history of an applicant or employee.[146] Neither term is defined, though the new law does expressly authorize employers to request written authorization from applicants to confirm prior compensation after an offer defining compensation has been extended.[147] This provision took effect on October 6, 2017.[148] The Oregon Bureau of Labor and Industries will begin enforcing this provision and may issue civil fines beginning January 1, 2019.[149] Beginning January 1, 2024, employees will have a private right of action against potential employers under this provision.[150]

Connecticut became the fifth state to enact a law banning an employer from asking prospective employees about their prior salary history. Connecticut Governor Dannel Malloy signed the Act

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[141] *Id*.

[142] CALIFORNIA ASSEMBLY BILL NO. 2282, "Salary history information," (Jul. 18, 2018), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2282.

[143] *Id.*

[144] *Id.*

[145] *See* CALIFORNIA PAY EQUITY TASK FORCE, JANUARY 10, 2018 AGENDA AND MEETING BINDER, https://women.ca.gov/wp-content/uploads/sites/58/2018/02/Pay-Equity-Task-Force-Meeting-Packet-.pdf (last visited July 11, 2018).

[146] OREGON HOUSE BILL 2005, supra note 81, at § 2(1)(c)-(d).

[147] *Id*. § 2(1)(d).

[148] *Oregon Equal Pay Law*, OREGON.GOV (Sept. 2017), http://www.oregon.gov/boli/TA/Pages/Equal%20Pay%20Law.aspx.

[149] *Id*.

[150] *Id*.

Concerning Pay Equity bill into law on May 24, 2018.[151] The Connecticut prohibits an employer, or a third party acting on the employer's behalf (like a recruiting firm), from inquiring about a prospective employee's wage and salary history unless voluntarily disclosed by the applicant. The law does permit an employer to inquire about other components that contributed to the applicant's previous total compensation package, but not about the value of those items. Although no examples are provided in the legislation, it would seemingly be permissible to ask whether a prospective employee received stock options at their previous employment, but not the value of those options. The salary history ban becomes effective January 1, 2019. The law amends Title 31 of the Connecticut General Statutes, Labor Section 31-40z, which also provides that employers cannot prohibit, among other things, employees from disclosing or discussing their wages with other employees. The statute allows up to two years for an action to be brought in court and an employer found liable under the law could face compensatory and punitive damages, as well as attorney's fees and costs.

Vermont law also restricts employers from making compensation history inquiries. Vermont Governor Phil Scott signed the legislation on May 11, 2018, and the law became effective on July 1, 2018.[152] Compensation includes base salary, bonuses, benefits, fringe benefits, and equity-based compensation. Employers may not require a prospective candidate's current or past compensation satisfy minimum or maximum criteria for employment either. If the candidate voluntarily discloses his or her compensation history, the employer may request that the applicant confirm the disclosed compensation after making an offer of employment. Furthermore, an employer may also ask a job candidate about general salary expectations. However, the employer may not determine whether to interview the prospective employee based on this information.

More recently, Hawaii banned employers from asking applicants about their prior compensation history on July 5, 2018. Employers are covered if they have at least 1 employee in the state, and the law becomes effective on January 1, 2019.[153] Employers are also prohibited from searching publicly available records or reports to learn about a candidate's salary history, but they may discuss compensation expectations with the candidate. Further, the law does not apply to applicants for internal transfer or promotion with their current employer.

Massachusetts, Delaware, California, Oregon, Connecticut, Vermont, and Hawaii are joined by Puerto Rico, where Act 16 took effect in March 2017. Act 16 prohibits salary history inquiries unless the

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[151] SUBSTITUTED HOUSE BILL NO. 5386 "An Act Concerning Pay Equity," *available at* https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2018&bill_num=5386.

[152] H. 294, 2018 Gen. Assemb., Leg. Sess. (Vt. 2018), *available at* https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/H-0294/H-0294%20As%20Passed%20by%20Both%20House%20and%20Senate%20Official.pdf.

[153] HAWAII S.B. 2351 (July 5, 2018), *available at* https://www.capitol.hawaii.gov/session2018/bills/SB2351_CD1_.PDF.

applicant volunteers such information or until an employer has extended an offer of employment, including the prospective rate of compensation.[154]

While no salary history law has been enacted at the state level in New York, one such law is percolating in the state legislature. Assembly Bill 6707, which would "prohibit[] employers from seeking salary history from prospective employees," was proposed in March 2017.[155] The bill, however, is presently stalled in committee. In the public sector, Governor Andrew Cuomo issued an executive order on January 10, 2017[156] that prohibits state entities from evaluating prospective candidates based on wage history.[157] In April 2018, Governor Cuomo unveiled Program Bill No. 20, proposed legislation that would expand the prohibition on wage history questions to private employers.[158]

2. Local and Municipal Laws

Wage equality proponents have found additional success at the municipal level. New York's Albany[159] and Westchester[160] counties have passed legislation generally prohibiting prior salary inquiries within those jurisdictions. In addition, on November 4, 2016, New York City Mayor Bill de Blasio issued an executive order banning city agencies from requesting job applicants' past salary.[161] A proposal before the New York City Council to expand the same protection to all public and private sector employees

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[154] Maralyssa Álvarez-Sánchez & Juan Felipe Santos, "Puerto Rico Enacts Equal Pay Law, Prohibits Employers from Inquiring about Past Salary History," THE NATIONAL LAW REVIEW (Mar. 13, 2017), https://www.natlawreview.com/article/puerto-rico-enacts-equal-pay-law-prohibits-employers-inquiring-about-past-salary.

[155] NEW YORK ASSEMBLY BILL 6707, "Prohibits employers from seeking salary history from prospective employees," (March 16, 2017), *available at* https://legiscan.com/NY/bill/A06707/2017.

[156] NEW YORK EXECUTIVE ORDER NO. 161, "Ensuring Pay Equity by State Employers," (Jan. 10, 2017), *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_161.pdf.

[157] A companion executive order issued January 11, 2017, requires prime and subcontractors in the state to report on a quarterly basis the job title and salary of each employee "performing work on a State contract." NEW YORK EXECUTIVE ORDER NO. 162, "Ensuring Pay Equity by State Employers," (Jan. 11, 2017), *available at* https://www.governor.ny.gov/news/no-162-ensuring-pay-equity-state-contractors. The executive order applies to contracts valued in excess of $25,000, and increases the frequency of reporting to monthly for construction contracts in excess of $100,000.

[158] *See* Program Bill #20 (Apr. 9, 2018), *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/GPB_%2320_SALARY_HISTORY_BILL.pdf

[159] LOCAL LAW NO. P FOR 2016 (October 10, 2017), http://albanycounty.com/Libraries/County_Executive/20171030-PH-16-LL_P.sflb.ashx.

[160] LAWS OF WESTCHESTER COUNTY § 700.03(a)(9).

[161] NEW YORK CITY EXECUTIVE ORDER NO. 21, "Restriction on Inquiries regarding Pay History" (November 4, 2016), http://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2016/eo_21.pdf.

passed on April 5, 2017.[162] The ordinance, which took effect October 31, 2017, is typical of salary history legislation, prohibiting employers from soliciting applicants' past wage information and from using this information in determining compensation but still allowing employers to discuss salary expectations with job applicants. Along with a majority of other salary history laws, the ordinance provides an important exception permitting employers to consider and verify previous wages when disclosed voluntarily and "without prompting."[163] A New York City employer may further "engage in a discussion" regarding "unvested equity or deferred compensation" that an applicant would forfeit by leaving his or her present employment.[164] The law expressly states that it does not apply to applicants for internal transfer or promotion with current employers.[165]

Recent guidance from the NYCCHR offers additional clarification regarding how the ordinance will be enforced.[166] First, the ordinance applies both to interviews for out-of-state jobs conducted in New York City as well as interviews for New York City jobs conducted outside of the state. Second, employers are prohibited from obtaining information about an applicant's prior wages from a secondary source or, if such information is discovered accidentally, from relying on this information in determining compensation. The guidance also provides that a disclosure is made "without prompting" when "the average job applicant would not think that the employer encouraged the disclosure based on the overall context and the employer's words or actions." The ordinance further will not impact an employer's ability to inquire about the value of an applicant's competing offers, or from asking about an applicant's salary history after compensation is set.

Philadelphia has also enacted legislation prohibiting employers from asking prospective employees about wage history.[167] The January 2017 ordinance declares that "[s]alary offers should be based upon the job responsibilities of the position sought and not based upon the prior wages earned by the applicant."[168] As a result, the bill not only prohibits employers from asking about prior salary, but also bans using prior salary information to set a newly-hired employee's salary if discovered later in the hiring process.[169] The Philadelphia Chamber of Commerce challenged the law, arguing that it violates employers' free speech rights and obstructs interstate commerce with little or no evidence that it will improve pay equity.[170] On April 30, 2018, a federal district court in the Eastern District of Pennsylvania

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[162] N.Y.C. ADMIN. CODE § 8-107(25).

[163] *Id*. at § 8-107(25)(d).

[164] *Id*. at § 8-107(25)(c).

[165] *Id*. at § 8-107(25)(e)(2).

[166] "Salary History Law: Frequently Asked Questions," NYCCHR (Oct. 10, 2017), http://www1.nyc.gov/site/cchr/media/salary-history-frequently-asked-questions.page#expectations.

[167] PHILA. CODE § 9-1131(2)(a)(i)-(ii).

[168] *Id*. § 9-1131(1)(e).

[169] *Id*. § 9-1131(2)(a)(i)-(ii).

[170] *See* First Amended Complaint, *Chamber of Commerce for Greater Phila. v. City of Philadelphia*, No. 2:17-cv-01548 (E.D. Pa. June 13, 2017); *see also* Tricia L. Nadolny, "Chamber Files New Suit, Leaving City's Wage Equity Law on Hold," PHILA. INQUIRER (June 14, 2017),

granted a preliminary injunction enjoining enforcement of the ordinance that prohibits employers from inquiring about prior salary, finding that such inquiry violates the First Amendment's free speech clause.[171] The court, however, left intact the portion of the provision that prohibits employers from relying on wage history to determine a salary for the employee.[172] Thus, any information an employer obtains through a lawful inquiry cannot then be used lawfully to establish salary, making the decision of limited import. The Chamber's lawsuit may become moot, as legislation has been introduced in the Pennsylvania state legislature that would preempt local equal-pay laws; as of May 2018, that legislation has not yet been taken up for a vote, however.[173]

In addition to New York City and Philadelphia, Chicago,[174] Kansas City (Missouri),[175] Louisville,[176] New Orleans[177] and Pittsburgh[178] have passed bans on salary history inquiries in the public sector. These prohibitions typically track similar state-level legislation as described *supra*. Chicago's executive order, for example, prohibits city departments from requesting or requiring candidates to disclose prior salary as a condition of an offer or employment, and prohibits such departments from engaging in candidate screening based on maximum or minimum prior salary criteria. Pittsburgh's ordinance forbids any city agency from relying on salary history in the hiring process, unless such information is volunteered by the candidate.[179]

The San Francisco Board of Supervisors voted unanimously in June 2017 to ban employers from asking applicants about prior salary history, and Mayor Ed Less subsequently signed the "Parity in Pay

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http://www.philly.com/philly/news/politics/city/chamber-files-new-suit-leaving-citys-wage-equity-law-on-hold-20170614.html.

171 *Chamber of Commerce for Greater Phila. v. City of Philadelphia*, 2018 WL 2010596 (E.D. Pa. Apr. 30, 2018).

172 *Id*. An appeal was filed in the case on May 30, 2018. *See Chamber of Commerce for Greater Phila. v. City of Philadelphia*, No. 18-2176 (3d Cir. May 30, 2018).

173 S. 241, Gen. Assemb., Reg. Sess. (Pa. 2017–18), http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2017&sInd=0&body=S&type=B&bn=241.

174 CHICAGO EXECUTIVE ORDER NO. 2018-1, "Reaffirmation of Commitment to Gender Pay Equality," (April 10, 2018), *available at* https://d12v9rtnomnebu.cloudfront.net/diveimages/EXEC_ORD_NO._2018-1_gen_20180410095817.pdf.

175 KANSAS CITY RESOLUTION NO. 180519.

176 LOUISVILLE ORD. NO. 2018-066.

177 NEW ORLEANS EXECUTIVE ORDER NO. MJL17-01.

178 CITY OF PITTSBURGH ORD. NO. 2017-1121.

179 *Id*.

Ordinance" into law.[180] It applies to all employers in the city, as well as city contractors and subcontractors. The law provides that employers may not "consider or rely on" applicants' salary histories in determining salaries to offer applicants, unless they volunteer the information or salary information is available online, as for city employees, for example. However, employers can still ask applicants about their "expectations with respect to salary."

Most recently, presumably in response to the wave of local salary ban laws, a few states have passed preemption bills prohibiting local legislation on salary history inquiries. On March 26, 2018, Michigan's governor signed an amendment to a 2015 law prohibiting local legislation on salary history inquiries.[181] The law is similar to preemption laws in other contexts, and further prevents local and municipal governments from legislating with respect to the minimum wage and sick leave. As amended, the law reaches more broadly than wage history questions alone, instead curtailing any regulation of "information an employer or potential employer must request, require or exclude … during the interview process."[182] A similar bill prohibiting local regulation of salary history inquiries passed in the Wisconsin legislature on March 22, 2018, and the Governor approved it on April 16, 2018.[183]

The rapid pace at which salary history bills are being introduced nationwide, as well as the countertrend in preemption bills, suggests an important direction in equal pay legislation, as well as a new and burgeoning compliance area for employers to monitor. For this reason, some employers are proactively adopting pay inquiry restrictions for their talent acquisition protocols as a reflection of their commitment to pay equity and, practically speaking, also based on the challenge of complying with varying laws nationally. For example, an employer with operations in New York and Massachusetts, and also localities where no pay nondisclosure law has been enacted, would face the quandary of managing different interview standards and applicant tracking systems for new hire candidates in certain jurisdictions versus others.

J. Other State and Local Laws of Interest

The National Women's Law Center issued a report in June 2018 highlighting the unprecedented level of activity in new state equal pay laws and legislation.[184]

Similar to the wage transparency and anti-retaliation provisions in the laws in California, Maryland, New York, and Washington, Connecticut and New Hampshire have enacted equal pay laws

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[180] S.F., CAL. ENACTMENT NO. 142-17, § 1 (2017), https://sfgov.legistar.com/View.ashx?M=F&ID=5328258&GUID=A694B95B-B9A4-4B58-8572-E015F3120929.

[181] M.C.L.A. § 123.1384.

[182] *Id*.

[183] WISCONSIN ASSEMBLY BILL NO. 748, "2017 Wisconsin Act," (Dec. 19, 2017), *available at* https://docs.legis.wisconsin.gov/2017/proposals/reg/asm/bill/ab748.

[184] Nat'l Women's Law Ctr., "Progress in the States for Equal Pay" (June 2018), *available at* https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/Progress-in-the-States-for-Equal-Pay-FINAL.pdf.

that prohibit employers from retaliating against employees for discussing their wages with each other or in general. North Dakota recently passed a law requiring employers to maintain records of employee compensation for the length of an employee's tenure, and to report on these records upon inquiry from the state. Illinois amended its equal pay laws to expand coverage to employers with four or more employees and increase the amount of civil penalties available for equal-pay violations. Delaware, Minnesota, and Oregon now hold state contractors accountable for certifying their compliance with state and federal equal pay laws. Finally, Rhode Island has created a tip line for employees to report violations of the state's gender-based wage discrimination laws.

In addition to the legislation described above, nearly a dozen states either proposed or passed bills to address the pay gap in 2017 and 2018, including Florida,[185] Indiana,[186] Louisiana,[187] Michigan,[188] Ohio,[189] Pennsylvania,[190] and South Carolina.[191] And while there is a clear trend among states to push for greater equal pay protections on a local level, there remains significant opposition to such enactments, particularly from those who argue that the legislation poses a threat to commercial prosperity and business survival.

In addition to the unprecedented volume of new equal pay legislation, state equal pay laws have begun to expand to the issue of public pay gap reporting. A California bill – enrolled in the state legislature on September 13, 2017 but vetoed by the Governor on October 15, 2017 – would have required employers with 500 or more employees to collect and report mean and median wage gap values by job classification or title beginning in 2019.[192] The proposed bill did not provide an enforcement

[185] FLORIDA SENATE BILL NO. 594, "Discrimination in Labor and Employment," (Oct. 23, 2017), *available at* https://www.flsenate.gov/Session/Bill/2018/594/BillText/Filed/PDF (proposed bill prohibiting opportunity and pay discrimination on the basis of sex, as well as prior salary inquiries).

[186] INDIANA HOUSE BILL NO. 1390 and INDIANA SENATE BILL NO. 93.

[187] LOUISIANA SENATE BILL NO. 117, "Requires that any contractor who enters into a contract with a state entity comply with the Louisiana Equal Pay for Women Act," (Apr. 2, 2018), *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=1075632 (proposed bill to expand equal pay protections to employees of government contractors).

[188] MICHIGAN HOUSE BILL NO. 4510, "Elliott-Larsen civil rights act," (Apr. 25, 2017), *available at* http://www.legislature.mi.gov/documents/2017-2018/billintroduced/House/pdf/2017-HIB-4510.pdf.

[189] OHIO HOUSE BILL NO. 180, "Eliminate sex-based disparities in pay," (Apr. 10, 2017), *available at* https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-180.

[190] PENNSYLVANIA SENATE BILL NO. 241, "Amending the act of December 17, 1959 (P.L.1913, No.694)," (January 31, 2017), *available at* http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2017&sessInd=0&billBody=S&billTyp=B&billNbr=0241&pn=0297.

[191] SOUTH CAROLINA HOUSE BILL NO. 3342, "South Carolina State Employee Equal Pay for Equal Work," (Jan. 10, 2017), *available at* https://www.scstatehouse.gov/sess122_2017-2018/prever/3342_20161215.htm.

[192] CALIFORNIA ASSEMBLY BILL NO. 1209, "Employers: gender pay differentials," (Feb. 17, 2017), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1209.

mechanism for any reported disparities. Instead, the information reported would have been published on a public-facing website maintained by the California Secretary of State.[193] Critics objected to the law on the basis that wage gap statistics which fail to control for other employee variables, such as skill or experience, are inherently misleading. Aggregate statistics may similarly lack substantial descriptive value, and are vulnerable to influence by extreme outlier values. Proponents, by contrast, noted that the bill was merely one tool to promote greater transparency among large employers and to encourage equal pay accountability. Notably, the bill followed the withdrawal of a proposed federal Department of Labor rule that would have required employers to collect and report employee wage information on the EEO-1 form.[194] The California bill, while less demanding in some respects, implicitly called for employers to follow many of the same collection procedures.

However, a new version of the bill resurfaced in February 2018 that would require California employers with at least 100 employees to annually report certain demographic pay data to the California Department of Fair Employment and Housing (DFEH).[195] Key provisions of the bill include annual reporting of the number of employees by sex, race, and ethnicity within each of ten broad job categories; the number of employees by sex, race, and ethnicity within each of the pay bands "used by the U.S. Bureau of Labor Statistics in the Occupation Employment Statistics survey"; and the number of hours worked by each employee within each pay band.[196] The legislation omits additional statistical reporting requirements that featured in the predecessor bill, such as mean and median pay gap figures. Further, the bill expressly designates information disclosed to the DFEH as confidential exempts such information from public disclosure under the California Public Records Act. As critics have noted, however, the broad job categories on which the reporting requirements are based do not track the California EPA requirement of equal pay for employees who perform "substantially similar" work, and therefore may be misleading in terms of identifying pay equity concerns.[197]What wage reporting laws will ultimately mean for employers beyond the immediate additional compliance costs remains to be seen. A likely outcome, however, is a rise in voluntary wage gap reporting among large employers to counter any unfavorable bottom-line statistics as published by the state, including more granular data analyses. Employers should expect to see similar bills on the horizon in other jurisdictions.

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193 *Id*.

194 Neomi Rao, "EEO-1 Form; Review and Stay," Office of Management and Budget (Aug. 29, 2017), *available at* https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

195 CALIFORNIA SENATE BILL NO. 1284, "Employers: annual report: pay data" (2018), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SB1284.

196 *Id*.

197 Erin Connell, Kathryn Mantoan, and Necia Hobbes, *The Coast is Not (Necessarily) Clear: California Seeks to Mandate Pay Data Reporting Modeled on Revised EEO-1 Form Stayed by OMB*, ORRICK'S EQUAL PAY PULSE (May 24, 2018), https://blogs.orrick.com/equalpaypulse/2018/05/24/the-coast-is-not-necessarily-clear-california-seeks-to-mandate-pay-data-reporting-modeled-on-revised-eeo-1-form-stayed-by-omb/.

III. PAY AUDIT AND REGULATORY INITIATIVES

A. Current OFCCP Audit and Enforcement Practices

The Obama Administration made pay discrimination a top priority, and the OFCCP has continued to pursue this policy vigorously in enforcement actions against contractors. Indeed, the agency continues to aggressively prosecute the enforcement actions filed at the end of the Obama Administration. Nonetheless, under the new administration, it is unclear whether the Agency will press forward on a very aggressive compensation and pay equity agenda. Some signs exist that President Trump would be interested in addressing equal pay albeit in a less onerous fashion compared to the past administration. In addition, Ivanka Trump has made several statements decrying the pay gap and OFCCP's efforts until the new Director gets up to speed.

Equal pay has also gained bi-partisan traction at the state level as Republican governors in Massachusetts and Maryland have signed far-reaching equal pay laws.[198] The Obama OFCCP's tactics, which relied heavily upon statistical analysis and expanded its approach to compensation reviews under Directive 307, may change under Republican leadership to mirror those guidelines previously employed by the George W. Bush administration and return to more traditional Title VII analyses.

The Obama administration's OFCCP's focus on equal pay has led to intensive investigation of compensation practices including massive human resources document requests and data demands. Compensation reviews generally consist of interviews with the compensation manager, but may potentially expand to other managers, and at times dozens or even hundreds of employees. The OFCCP will conduct manager interviews in the presence of an organization's in-house and external counsel if requested, but typically insists on completing a random selection of employee interviews during audits without any employer representatives present. Employers can request to know the names of non-manager employees to be interviewed, however, in order to ensure proper notification and debriefing.

Enforcement actions by OFCCP involving systemic pay discrimination have also carried significant payments. In January 2017, LexisNexis settled with OFCCP for more than $1.2 million for systemic pay discrimination claims.[199] OFCCP looked back as far as December of 2012 finding significant differences in pay between men and women doing the same jobs even after factoring in legitimate, sex-neutral factors. The agreement includes back pay and interest for 111 female employees at two locations and more than $45,000 in adjustments to female salaries. LexisNexis further agreed to conduct an annual compensation analysis at two locations.

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198 *See* Mass.gov, "Governor Baker Signs Bipartisan Pay Equity Legislation*"* (Aug. 1, 2016), https://www.mass.gov/news/governor-baker-signs-bipartisan-pay-equity-legislation; Maryland.gov, "Equal Pay for Equal Work – Employment Standards Service," https://www.dllr.state.md.us/labor/wages/equalpay.shtml (last visited March 15, 2018).

199 U.S. Dep't of Labor, "LexisNexis Risk Solutions to Pay Over $1.2M in Back Pay and Interest to 211 Employees After Investigation Finds Pay Discrimination" (Jan. 12, 2017), https://www.dol.gov/newsroom/releases/ofccp/ofccp20170112.

The previous administration closed with a flurry of new enforcement actions and settlements, including aggressively pursuing two large tech companies and a large financial institution within two weeks of each other for actions involving compensation.

- Google Inc. (San Francisco). In a suit against Google, OFCCP is seeking to require the company to provide compensation data and documents for Google's Headquarters as part of a compliance evaluation. If Google fails to comply, OFCCP has asked the court to cancel all of Google's current government contracts and to debar the company from entering into future contacts. In March, an administrative law judge denied the DOL's request for summary judgment saying that the department's request, which included job and salary histories among 38 categories of data, was not reasonable.[200] A hearing before an administrative law judge on the issue of OFCCP's data and document requests was held in May. On July 14, 2017, the Administrative Law Judge issued a ruling denying the bulk of OFCCP's data requests on the grounds that they were not reasonable, but did uphold a more limited request for employee compensation and contact information.[201] The OFCCP has filed an appeal of the ALJ's decision with the Administrative Review Board (ARB).[202]

- Oracle America, Inc. (San Francisco). OFCCP's action against Oracle America, Inc. seeks to remedy discriminatory pay practices via a permanent injunction and lost wages, stock, interest, front wages, salary adjustments, promotions and all other lost benefits of employment and a reform of discriminatory policies. The government alleges that the company systemically paid white male workers more than female, African American and Asian counterparts.[203] In addition, OFCCP has alleged that Oracle discriminated against Whites and African Americans by preferring Asians in the hiring process.

- JPMorgan Chase & Co. (New York). The OFCCP accuses JP Morgan Chase of systematically discriminating against female employees in certain professional positions by compensating them less than their male counterparts. This suit affects at least 93 female employees within their Investment Bank, Technology & Market Strategies unit.[204]

Under the Trump Administration, there have been a few settlements, but no filed lawsuits. Recent cases reflect OFCCP's push into systemic compensation cases in more complex workplaces,

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200 *See* Order Den. Pl.'s Mot. For Summ. J. at 6, *OFCCP v. Google Inc*., 2017-OFC-00004 (Mar. 15, 2017).

201 *OFCCP v. Google, Inc*., 2017-OFC-00004 (July 14 2017).

202 Plaintiff OFCCP's Exceptions to the Administrative Law Judge's July 14, 2017 Recommended Decision and Order, *OFFCP v. Google Inc*., ARB Case No. 17-059 (Aug. 23, 2017).

203 *See* U.S. Dept. of Labor, "US Department of Labor Sues Oracle America, Inc. for Discriminatory Pay Practices" (Jan. 18, 2017), https://www.dol.gov/newsroom/releases/ofccp/ofccp20170118-0.

204 *See* U.S. Dept. of Labor, "US Department of Labor Sues JP Morgan Chase & Co. for Discriminatory Pay Practices Against Female Employees" (Jan. 18, 2017), https://www.dol.gov/newsroom/releases/ofccp/ofccp20170118.

including the technology and financial services sectors. These sectors were particular targets during the previous administration. By carrying over the plan for the two research centers, we expect that the new administration will continue the push in auditing and enforcing matters against contractors in these sectors.

B. Regulatory and Guidance Updates

1. Sex Discrimination Regulations

On June 14, 2016, OFCCP unveiled its final sex discrimination guidelines governing covered federal contractors.[205] The OFCCP proposed changes to the rule on January 30, 2015, and the official comment period closed on April 14, 2015, following a two-week extension so that it could take comment on the Supreme Court's pregnancy discrimination decision in *Young v. United Parcel Serv., Inc*.[206] The final rules came six months after the expected date and almost seven years after the agency signaled that it was seeking to update the rules.

The final rules mark a significant rewriting of the guidelines, which were originally published in 1970, and address various legal developments regarding sexual harassment, pregnancy leave, gender identity, and sex stereotyping. The OFCCP attempted to minimize the impact of the final rules by stating that the rules merely enshrine policies already established by the courts and other federal agencies.[207] However, by codifying those principles through notice and comment rulemaking and announcing them with fanfare at the White House,[208] the Obama Administration sent a clear signal that the rule change was an important part of its domestic equality agenda.

The final rule forbids any "employment practice that discriminates in wages, benefits, or other forms of compensation."[209] While this prohibition is somewhat generic, the textual changes from the proposal and agency's discussion of compensation discrimination is enlightening based on the OFCCP's recent aggressive stances on pay disparity. The final rule changes the prohibition on denying "equal wages" to "discrimination in wages," clarifying confusion implicating the Equal Pay Act. In explaining its view of the term "similarly situated," the agency noted it intended to have flexibility in how the term should be used and that it would be case specific. Specifically, the agency stated that, "depending on the unique pay systems and policies of a given contractor, [the analysis] may involve comparing employees

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[205] 81 Fed. Reg. 39108 (final rule).

[206] 135 S. Ct. 1338 (2015).

[207] The regulations are an outgrowth of one of President Obama's early government-related initiatives. Executive Order 13563 required agencies to review their regulations and identify those that could be "more efficient and less burdensome." The Department of Labor identified OFCCP's guidelines through this process. Nonetheless, it took the agency about six years to draft the regulations and then another 18 months to finalize them.

[208] The U.S. Dept. of Labor, "US Labor Department Announces Updated Sex Discrimination Regulations for Federal Contractors" (June 14, 2016), https://www.dol.gov/newsroom/releases/ofccp/ofccp20160614.

[209] 41 C.F.R. § 60-20.4.

in similar, but not necessarily identical, jobs or employees who are similar in terms of level, function or other classification relevant to the contract's workforce."[210] The agency also addressed specific factors that may affect pay. Some commentators requested that the agency add "market forces" and "prior salary" to the regulatory language as factors that may be discriminatory.[211] The agency declined stating that the case law was unsettled and did not support adding a "per se" rule permitting or prohibiting the use of such factors.[212] Rather, the agency settled on evaluating the factors on a case-by-case basis. The analysis also addresses the relevant legitimate factors that contractors may rely upon to explain differences in pay. The agency listed the relevant factors as:

- A particular skill or attribute;
- Education;
- Work experience;
- The position, level or function;
- Tenure in a position; and
- Performance ratings.[213]

The agency states that it would determine whether such factors would be tainted by discrimination or should be included as legitimate factors based on the facts of the particular cases.

On August 24, 2018, the OFCCP unveiled a new directive, Directive 2018-05, which rescinds former Directive 2013-03.[214] Directive 2018-05 leaves unaltered the agency's substantive guidelines concerning prohibited discrimination, but updates its protocol for assessing compensation practices. For example, the Directive specifies that except in cases where the statistical evidence is "exceptionally strong," the agency is less likely to pursue matters involving exclusively statistical disparities, versus those corroborated by anecdotal evidence.[215] The Directive also provides some limited detail on the agency's analytical methodology.[216] However, the Directive also omits references, as under the former Directive, to three key inquiries guiding a compliance officer's investigation with respect to compensation differentials.[217] How precisely these changes will impact agency audits and enforcement actions remains to be seen.

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[210] 81 Fed. Reg. 39127 (final rule).

[211] *Id.*

[212] *Id.*

[213] 81 Fed. Reg. 39128 (final rule).

[214] U.S. DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DIR 2018-05, ANALYSIS OF CONTRACTOR COMPENSATION PRACTICES DURING A COMPLIANCE EVALUATION (2018), available at https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_05.html.

[215] *Id.*

[216] *Id.*

[217] *Compare* DIR 2018-05, *supra* note 207, and U.S. DEPT'S OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAM, DIR 2013-03, PROCEDURES FOR REVIEWING CONTRACTOR COMPENSATION

2. Equal Pay Report and EEO-1 Pay Reporting

The Obama Administration had turned to the OFCCP and the EEOC as its prominent weapons on pay equity. In 2014, the OFCCP issued a Notice of Proposed Rulemaking ("NPRM") for contractors that are required to file EEO-1 reports to file an annual Equal Pay Report. Today, while the Equal Pay Report technically remains on the agenda,[218] the final rule has been essentially mooted by the EEOC's finalizing the EEO-1 form to include compensation information.

Like the OFCCP, equal pay been a priority for the EEOC in its enforcement of Title VII. In 2012, and again in 2016, the EEOC released its Strategic Enforcement Plan (SEP), identifying national priorities of the agency.[219] Enforcing equal pay laws and targeting "compensation systems and practices that discriminate based on gender" were priorities for fiscal years 2013 through 2016.[220] For fiscal years 2017 through 2021, the EEOC extended this priority to cover other types of pay discrimination, including discrimination based on race, ethnicity, age, disability, and "the intersection of protected bases."[221]

In September 2016, the EEOC announced approval of a revised EEO-1 form that would have required certain employers to report aggregate W-2 pay data, as well as hours worked, by gender, race, and ethnicity across twelve pay bands for the ten EEO-1 job categories[222] beginning in March 2018.[223] The job categories, which remain unchanged from the prior EEO-1 form, include broad groupings such as "Professionals" and "Service Workers."[224] On August 29, 2017, however, the Office of Management and Budget (OMB) informed the EEOC that it was initiating a review and immediate stay of the pay data

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SYSTEMS AND PRACTICES (2013) at 7, available at https://www.dol.gov/ofccp/regs/compliance/directives/Dir307_508c.pdf.

218 79 Fed. Reg. 46562 (proposed rule).

219 *See* Press Release, "U.S. Equal Emp't Opportunity Comm'n, EEOC Approves Strategic Enforcement Plan" (Dec. 18, 2012), https://www.eeoc.gov/eeoc/newsroom/release/12-18-12a.cfm; Press Release, U.S. Equal Emp't Opportunity Comm'n, "EEOC Updates Strategic Enforcement Plan" (Oct. 17, 2016), https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm.

220 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2013–2016, at 8–10 (2012), http://www.eeoc.gov/eeoc/plan/sep.cfm.

221 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2017–2021, at 8 (2016), https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

222 Agency Information Collection Activities: Revision of the Employer Information Report (EEO–1) and Comment Request, 81 Fed. Reg. 5113 (Feb. 1, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf.

223 Press Release, U.S. Equal Emp't Opportunity Comm'n, "EEOC to Collect Summary Pay Data" (Sept. 29, 2016), https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm.

224 *See Agency Information Collection Activities: Revision of the Employer Information Report (EEO–1) and Comment Request*, *supra* note 205.

collection aspects of the revised EEO-1 form.[225] Given this open review and stay of the pay data collection aspect of EEO-1 reporting, employers must comply with the earlier approved EEO-1 by the previous filing date of March 31, 2018.[226] It remains to be seen what will happen to the EEO-1 pay reporting rule.

IV. RESPONDING TO AND DEFENDING AGAINST SHAREHOLDER PROPOSALS

In response to the recent trend of state-enacted equal pay laws and regulations, many companies are now facing shareholder proposals from activist groups and individual shareholders aimed at requiring the company to publicly disclose the percentage "pay gap" between male and female employees, as well as the steps the company is planning to take to rectify the disparity. Technology companies, specifically, have been the target of many recent proposals. In fact, in 2015 and 2016, Arjuna filed shareholder proposals against tech giants including Microsoft, Intel, Amazon, Google, and Facebook, that, if passed, would have required disclosing publicly percentage pay gaps between male and female employees and remediation plans. In response, several companies, including Apple, Intel, and Amazon, released gender pay information, including statistics and remediation plans.[227] These releases largely satisfied the activist funds. Shareholders of other companies, such as Google and Adobe, defeated the proposals and declined to disclose pay data.[228]

In late 2016 the same three activist funds issued a second wave of shareholder proposals, this time targeting prominent U.S. financial institutions for the 2017 proxy season.[229] Consistent with earlier efforts in the technology industry, these demanded disclosure of sex-based compensation data, as well as additional diversity statistics on employee race and gender. Targets included Goldman Sachs, Citigroup, Bank of America, Bank of New York Mellon, Wells Fargo, American Express, MasterCard, and JPMorgan Chase. Pax withdrew several proposals directed at companies that agreed to terms of disclosure, but MasterCard allowed the proposal to go to a vote. Only 7.8% of shareholder votes favored

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225 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW: STATEMENT OF ACTING CHAIR VICTORIA A. LIPNIC ABOUT OMB DECISION ON EEO-1 PAY DATA COLLECTION (2017), https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm.

226 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, QUESTIONS AND ANSWERS: THE 2017 EEO-1 REPORT, https://www.eeoc.gov/employers/eeo1survey/2017-qanda.cfm (last visited July 12, 2018).

227 Press Release, Arjuna Capital, "Arjuna: Microsoft Is Fifth Tech Giant This Year To Respond To Shareholder Push For Gender Pay Equity" (Apr. 11, 2016) https://arjuna-capital.com/news/arjuna-microsoft-is-fifth-tech-giant-this-year-to-respond-to-shareholder-push-for-gender-pay-equity/.

228 Press Release, Arjuna Capital, "Alphabet Still Learning the A-B-Cs of Gender Pay Equity" (June 10, 2016) http://arjuna-capital.com/news/alphabet-still-learning-b-cs-gender-pay-equity-sexist-reference-lady-cfo-followed-shareholder-vote/; Letter from Matt S. McNair, Senior Special Counsel, Sec. & Exchange Comm'n, to Michael Dillon, Adobe Systems Incorporated (Jan. 4, 2016), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/adamseitchik010416-14a8.pdf.

229 Laura Colby, "Goldman, Citigroup Targeted by Diversity Activists in 2017," BLOOMBERG (Dec. 6, 2016), https://www.bloomberg.com/news/articles/2016-12-06/goldman-citigroup-in-crosshairs-of-diversity-activists-for-2017.

the proposal, but Pax has said "it's enough to permit the resolution to be refiled next year."[230] In recent months, however, financial services companies have shown increased willingness to publicly disclose information regarding their gender and pay gaps, with Citigroup leading the way in January 2018[231] and several other financial institutions, including Bank of America, BNY Mellon, Wells Fargo, MasterCard, JPMorgan Chase, and most recently, American Express, following suit.[232]

Additional industries, including retail and telecommunications, are now in the sights of activist investors. Arjuna Capital has filed proposals against Starbucks, Nike, The Gap, Costco, and Walmart similar to those it filed against technology companies.[233] Zevin Asset Management, LLC filed a similar proposal against TJX Cos., the owner of T.J. Maxx, Marshalls, and HomeGoods.[234] Telecommunications firms including Qualcomm, Verizon, and AT&T have also been targeted.[235] In addition to seeking gender pay gap information, however, this latest round of proposals also sought pay gap information on race and ethnicity.[236] Arjuna Capital also released its first Gender Pay Scorecard ("GPS") in April 2018.[237] The GPS analyzes quantitative metrics for 33 of the world's largest companies in finance, technology, and retail based on "current gender pay disclosures, performance, and commitments" and assigns each company a grade between A and F.[238] Perhaps unsurprisingly, no company listed in the 2018 GPS received an "A" grade.[239]

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230 Julie Gorte, "New Opportunities, New Challenges," PAX (Sept. 11, 2017), http://paxworld.com/new-opportunities-new-challenges/.

231 Laura Colby & Dakin Campbell, "Citigroup Discloses Gender and Racial Pay Gaps, Plans Raises," BLOOMBERG (Jan. 15, 2018), https://www.bloomberg.com/news/articles/2018-01-15/citigroup-discloses-gender-and-racial-pay-gaps-plans-raises.

232 Leslie P. Norton, "AmEx Agrees to Report Gender Pay Gap," BARRON'S (Mar. 7, 2018), https://www.barrons.com/articles/amex-agrees-to-report-gender-pay-gap-1520455335.

233 Andrea Vittorio, "Shareholders Ask Retailers to Mind the Pay Gap," BLOOMBERG BNA (Jan. 10, 2017), https://www.bna.com/shareholders-ask-retailers-n73014449531/; "Gender Pay Equity: Costco Latest Retail Giant To Take Action, Following Leads of Starbucks, Nike, and Gap – reports Arjuna Capital," CISION PR NEWSWIRE (Nov. 16, 2017), https://www.prnewswire.com/news-releases/gender-pay-equity-costco-latest-retail-giant-to-take-action-following-leads-of-starbucks-nike-and-gap---reports-arjuna-capital-300557830.html.

234 *Id*.

235 Laura Colby, "Goldman, BNY Mellon Bow to Investor Pressure on Gender Pay," BLOOMBERG (Mar. 23, 2017, 4:03 PM), https://www.bloomberg.com/news/articles/2017-03-23/goldman-bny-mellon-bow-to-investor-pressure-on-gender-pay-gap.

236 Vittorio, *supra* note 216.

237 Arjuna Capital, Gender Pay Scorecard, April 2018, http://arjuna-capital.com/wp-content/uploads/2018/04/GenderPayScorecard.pdf

238 *Id.* at 1.

239 *Id.*

Responding to such proposals raises various concerns for management, including (1) minimizing litigation risk; and (2) presenting an image of social corporate responsibility. Various options exist for responding to and dealing with such proposals, as discussed below.

A. Responding to Shareholder Proposals

Companies that receive shareholder proposals have three main options to respond: (1) omit the proposal from the proxy statement by requesting and receiving a no-action letter from the SEC; (2) informally resolve the matter with the shareholder/activist group that made the proposal; and (3) include the proposal in the proxy statement, along with a recommendation for a "no" vote. These three options are discussed below.

1. No-Action Letters

Many companies that have received shareholder proposals regarding equal pay are seeking to omit the proposals from their proxy statements by requesting no-action letters from the SEC, pursuant to 17 CFR 240.14a-8. Various arguments have been raised by companies seeking no-action letters in this regard, including the following:

- Management Functions. A company may seek to exclude the proposal by arguing that the topic of equal pay is a matter relating to the company's ordinary business operations. (14a-8(i)(7))

- Violation of Proxy Rules. A company may seek to exclude the proposal on the grounds that the proposal violates any of the proxy rules set forth in section 240.14a-9, including that the proposal is vague and indefinite. (14a-8(i)(3))

- Absence of Power/Authority to Implement. A company may seek to exclude a proposal from the proxy report by arguing that the company lacks the power or authority to implement the proposal. (14a-8(i)(6))

- Substantial Implementation. A company may seek to exclude a proposal from the proxy report if it has already substantially implemented the proposal, i.e., by claiming to have 100% pay equality, or by already publicly committing to eliminate any existing pay gap. (14a-8(i)(10))

- Failure to Meet Procedural Requirements. A company may seek to omit a proposal from the proxy statement on the basis that the shareholder presenting the proposal did not meet the eligibility and/or procedural requirements to do so; however, a company may do so only after providing the shareholder with an opportunity to correct the deficiency. (14a-8(f))

The SEC has generally denied company requests for no-action letters to omit shareholder proposals related to equal pay, making these efforts largely unsuccessful.

2. Voluntary Settlement/Disclosure

Given the lack of traction from the SEC in being permitted to omit such proposals from their proxy reports, many companies are instead choosing to resolve such matters informally with the activist

shareholders by voluntarily releasing gender pay information claiming 100% equity/near-equity in terms of pay structure, and/or making a public commitment to eliminate any pay disparity within a certain timeframe with clearly delineated steps to achieving that goal, in exchange for the shareholder and/or activist group withdrawing its proposal on the topic.

3. Inclusion in Proxy Statement with Recommendation for "No" Vote

Alternatively, companies may choose to present the proposal, along with a recommendation for a "no" vote, on their proxy statements. To date, all proxy statements to include such a proposal have recommended "no" votes to release the data, citing other and better sources of information demonstrating a commitment to gender diversity. Such data might include workplace demographic data, as well as data regarding diversity and inclusion efforts.

B. Potential Exposure

1. Liability Under 17 CFR 240.14a-9 – False or Misleading Statements

When responding to a shareholder proposal, companies must take care to avoid potential liability that can arise from the content of the response. For example, if a company chooses to include in its proxy statement any explanation as to why it recommends a "no" vote on the shareholder proposal, the company could face liability under section 14a-9 based on the contents of the disclosures. Section 14a-9 provides that the content and reasons contained in a proxy statement cannot include any material misrepresentation or omission. In determining "materiality," the question posed is whether a reasonable shareholder could consider the matter important in deciding how to vote. Additionally, the standard for liability under section 14a-9 is probably negligence, not scienter. Accordingly, a plaintiff need not show that the misstatements were made with an intent to deceive, manipulate, or defraud the shareholders in order to prove liability. Instead, lesser misrepresentations can be sufficient to establish liability, such as misleading statements or statistics that misrepresent the existence and/or scope of any pay disparity.

2. Liability Under 17 CFR 240.10b-5 – Employment of Manipulative and Deceptive Devices

Companies may also face liability under 10b-5 based on what they choose to disclose in a pay equity report. Section 10b-5 broadly prohibits the making of any untrue or misleading statements or omissions as to material facts in connection with the purchase or sale of any security. A company could face liability if it chooses to disclose information on its pay equity statistics, policies, and/or future goals or plans to address and eliminate any existing disparity. Accordingly, the contents of any such disclosure must comply with the requirements of 10b-5 to be accurate, complete, and not misleading. Liability under 10b-5 is harder to establish than under 14a-9, given that it requires a finding of intentional fraud or deceit. However, a company must still exercise care to ensure that no inaccurate or misleading statements or omissions are made and may have a duty to disclose and/or correct any prior statements that were misleading.

C. Practical Recommendations

A company can take various steps to protect itself from such activist proposals or, at the very least, to be prepared to respond to such a proposal. First, a company should conduct an audit of its

employees' pay data to determine if any disparities exist and, if so, whether the disparities can be justified by factors other than gender. If a disparity is identified, the company should take steps to correct it.

After conducting such an audit, a company must consider whether to release the results of the audit, either in full or in part. When doing so, special consideration must be given to preserving privilege, to the extent it exists, as discussed more fully in Section V.C. below. Determinations will depend on each company's particular balance of minimizing litigation risk against demonstrating social corporate responsibility.

V. PAY AUDITS

In response to the increased regulatory, legislative, and litigation focus on equal pay, including the trends of pay transparency and the public disclosure of pay data, many employers have adopted, or are considering adopting, more robust processes to monitor compensation. Chief among these efforts are pay audits. These audits seek to determine whether the company or some subdivision has either a pay gap or, according to one or more potentially applicable legal standards, a pay equity problem. Pay gap audits – attempting to determine the ratio between the compensation paid to male and female employees – are done for a variety of reasons, including by companies considering a public disclosure.[240] A recent U.K. law makes such disclosures mandatory, requiring employers with 250 or more employees to publish certain statutory pay gap statistics on an annual basis.[241] Those statistics include mean and median pay gap values for compensation and bonuses, as well as the respective proportions of men and women in an employer's workforce that received bonus payments.[242] Employers also conduct pay equity audits for various reasons, but most often to assess risk from litigation or enable legal counsel to provide informed advice about forward-looking compensation practices. This section gives an overview of some of the more common types of pay audits, and seeks to provide general guidance and practice tips for developing and conducting such audits. The best approach for a particular company will depend on a host of factors, including the impetus for the pay audit, the presence of threatened or ongoing litigation, and the particular business needs that guide the company's compensation practices.

A. Pay Gap Audits

Employers contemplating a public statement or disclosure about their pay data first need to determine what their data shows. Most often, employers do this through a privileged analysis to determine whether or not they have a "pay gap." Generally, these audits are nationwide, although pay gap audits can be conducted on one or more subsets of a company's employee population.

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[240] Although pay audits most often address gender-based compensation differences, they can be performed to examine pay disparities between any two groups of employees (e.g., different races, ethnicities, *etc.*).

[241] Advisory, Conciliation and Arbitration Service and Government Equalities Office, "Gender Pay Gap Reporting: Overview" (Feb. 22, 2017), https://www.gov.uk/guidance/gender-pay-gap-reporting-overview.

[242] *Id.*

Because the goal of such an audit is to compare the average earnings of women with the average earnings of men, these types of audits typically do not attempt to control for all variables that may legitimately impact pay (*e.g.*, choice of specialty or role within the company). Of note, several financial services companies in early 2018 publicly reported their pay gap results as follows:

Financial Services Firm	Female average salary compared to males	Ethnic minority average salary compared to Whites
Citi Group	99%	99%
Bank of America	99%	99%
MasterCard	99%	Not reported
Wells Fargo	99%	99%
BNY Mellon	99%	99%
JP Morgan	99%	99%

Particularly if an employer is considering a public disclosure of pay gap statistics, it is important that the analysis and results be accurate and reliable, and that they are clearly distinguished from pay equity analysis based on regression modeling more likely subject to an attorney/client privilege protections (as discussed in the section below). Accordingly, a best approach is to work with an experienced statistician or labor economist to conduct the statistical analysis. It also is important to ensure the underlying data on which the analysis is based is complete and accurate. Particularly in cases where the underlying data comes from more than one source, an experienced statistician or labor economist can help reconcile such information into a usable database, including reconciliation of current and historical data pulls.

B. Pay Equity Audits

Pay equity audits – which seek to assess a company's pay practices against one or more potentially applicable legal standards or government agency approaches – are significantly more complicated than pay gap analyses. The most common type of pay equity analysis is a statistical model using regression factors to compare the pay of groups of employees. In some cases, individual, or "cohort," comparisons also are used. Pay equity audits compare earnings of men and women or of other protected groups after controlling for a robust set of variables that impact pay. They aim to determine whether comparable employees (who, depending on the applicable law or jurisdiction, could be "similarly situated" employees, or employees who perform "equal" or "substantially similar" work) are nevertheless paid unequally. Accordingly, a critical first step in any pay equity analysis is determining which employees to compare to one another.

In most cases, and particularly for jobs involving specialized, unique and advanced skill sets, aggregating dissimilar employees into a single statistical model will yield invalid results. Thus, in determining the appropriate employee groupings, it is imperative to identify upfront who appropriate comparators are, taking into account the myriad state and federal laws that may define related but non-identical standards. Overreliance on factors such as job title or level to identify comparators could lead to invalid results and generate false positives, if not every employee in the company with the same job title and level is truly doing the same type of work on projects of comparable difficulty and importance to the company. For this reason, courts have regularly rejected analyses that rely uncritically on job title alone

to identify comparators. A more nuanced analysis is generally needed. In some cases, employers may find their jobs are so specialized and unique that comparable groups large enough for statistical analysis do not exist, and a meaningful statistical analysis is not possible.

In addition to identifying appropriate comparator groupings, a pay equity analysis also must identify and incorporate legitimate factors that could explain pay disparities. Potential examples may include time in company, time in level, organization, performance rating, or prior experience. An experienced statistician or labor economist can assist in determining which variables correlate with pay, and should be included in the model. A pay equity analysis may be subject to criticism if it omits relevant variables, or if variables that are included are later alleged to be biased or discriminatory themselves (*i.e.*, "tainted" variables). Accordingly, carefully analyzing and determining which factors to include in an analysis is critical. It is also important to determine whether there are legitimate determinants of pay in the company's compensation system that cannot be reduced to numeric values (*i.e.*, are nonquantifiable), and thus cannot be accurately captured by or controlled for in a statistical model.

As with pay gap analyses, the data on which any analysis will be based must be complete and accurate. Errors or gaps in the underlying data set, which typically includes information pulled and aggregated from various sources, can lead to inaccurate or unreliable results. Accordingly, any questions or uncertainties about the underlying data should be addressed and reconciled prior to conducting an analysis.

C. Establishing and Preserving Attorney-Client and Attorney Work-Product Privileges

In order to preserve attorney-client privilege and attorney work-product protections, employers typically conduct pay analyses pursuant to the direction of legal counsel. As the Supreme Court has recognized, protecting these privileges is important to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[243] Retaining outside counsel to direct the analysis – including the work of retained labor economists or statisticians – encourages candid discussions about their compensation practices, and allows exploration of a wider range of possible models without concern that those explorations may later be subject to discovery in any future litigation, and/or taken out of context.

Retaining outside counsel to direct pay audits, rather than relying solely on their in-house teams, also sidesteps arguments about whether in-house counsel are functioning in a business role, or providing advice for a "business" and not a "legal" purpose, and thus are operating outside the scope of the privilege. The engagement letters for these retentions may make clear that legal advice is being sought from outside counsel, and confirm that counsel are being retained so that they can use their legal skills and expertise to provide legal advice to the company. Any third-party experts retained by outside counsel may in turn work under a retention agreement that specifies that counsel will direct the analysis to be done, in service of counsel's formulation of legal advice.

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[243] *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

Pay equity audits may also fall under the ambit of protected work product, if they are done "in anticipation of litigation."[244] Attorney work product is a qualified privilege only, however, and the law in many jurisdictions is unsettled regarding whether litigation is "anticipated." Nevertheless, reliance on both attorney-client privilege and attorney work product is advisable for purposes of encouraging candid discussions about compensation practices, identifying potential pay disparities, and determining appropriate remedial steps when needed.

In addition, steps should be taken by employers conducting audits to ensure that appropriate internal Human Resources, managers and other professional adopt the practice of labeling emails, documents, instant messages and other correspondence related to an audit as "Attorney/Client Privileged & Confidential; Attorney Work Product" or similar wording. Appropriate care should also be taken to ensure that in-house lawyers distribute advice-based audit communications instead of permitting employees to do so, or to forward same indiscriminately to others in the firm. While this approach should not be overused, or used incorrectly, the absence of this discipline can call into question whether key audit-related communications and underlying analyses are discoverable.

D. Interpreting the Results and Determining Next Steps

When statistically significant disparities are discovered in either a pay gap audit or pay equity audit, careful consideration of next steps is warranted. Doing nothing in the face of observed and unexplained disparities could potentially increase legal risk, given an employer's knowledge of the disparities. Accordingly, many employers seek to investigate and better understand the causes of any observed disparities, and may ultimately decide that pay adjustments are appropriate. At the same time, reflexively adjusting compensation before considering whether legitimate factors –including factors that may have been overlooked in the initial model, or may not be susceptible to statistical modeling – explain the observed differences is rarely the best course of action.

Employers can take one of several approaches in response to a pay gap audit. If the analysis does not show any significant disparity, employers may choose to publicize the results. It is important to first confirm the accuracy and robustness of the analysis, however, as highlighted above – particularly if the employer is a publicly-traded company subject to SEC oversight. If the analysis does indicate disparities, the employer may want to consider drilling down via a more robust pay equity analysis that – unlike a nationwide pay gap audit – endeavors to control for the variables that legitimately impact pay.

The results of an in-depth pay equity audit also present employers with several options. Most employers focus on those divisions or segments of the company, if any, in which statistically significant pay disparities are identified. At this point, employers may begin by taking another look at the variables included in the initial model. The presence of a statistically significant disparity simply means that the difference is unlikely to have occurred by chance, and only suggests a pay equity problem if the model appropriately controls for every variable that plays in to determination of pay. Previously omitted, legitimate variables – for example, length of service in a particular department or on a particular product team – may have further explanatory power. Cohort analyses that compare two or more employees who the initial model treated as comparators may bring to light other nondiscriminatory factors that legitimately impact pay and explain seeming disparities.

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[244] FED. R. CIV. P. 26(b)(3).

Next steps may also involve determining whether there are any outliers be they female or male, highly compensated or not – that could have skewed the analysis. For example, a single employee who was "red circled" – *i.e.*, who chose to move to a lower-level role within the company, but who was not required to take a corresponding pay cut – can create the appearance of a problematic disparity when, in fact, there is a legitimate explanation for the disparity. This is particularly true where the groups of employees being compared to one another are relatively small. Understanding the sources of any outlier compensation can therefore be important in determining how to proceed.

A prudent employer may also want to look more broadly at the policies or practices that may have caused any observed disparity, in order to mitigate risk going forward. This may include evaluating the performance management or evaluation systems that impact pay, and standards for promotion, to determine whether these are being consistently applied across the company. Another heavily debated topic – and one which many employers opt to review – are practices for determining starting pay, whether of entry-level hires or lateral recruits. Additionally, employers may want to consider making targeted and appropriate pay adjustments, which must take the form of increasing the pay of one or more individuals (rather than "levelling down"). Making pay adjustments may raise several legal implications, as discussed in more detail below in Section V.E. Sustained inaction as to persistent unexplained disparities, however, can lead to avoidable risk for the organization, warranting consideration of awarding pay increases to affected employees at some standardized frequency. Conducting this process apart from an organization's typical year-end performance review and related bonus determination cycle may be helpful to ensure that competitive merit-based pay decisions are separated from equity-based pay increases.

Finally, employers can use the lessons learned from a pay equity audit to inform best practices going forward. In addition to evaluating policies and practices for determining compensation, employers are well-advised to renew their focus on documentation and record-keeping regarding pay decisions. The legitimate factors that inform an individual's starting salary or adjustments thereafter can and should be recorded, so that the determinants that impacted pay can be reviewed if and as needed.

E. Legal Implications of Resulting Pay Adjustments

Making pay adjustments following a pay equity study to only females and people of color ("POC") identified as negative outliers, excluding white male negative outliers, raises several legal implications. A likely plaintiff(s) would be a white male employee or a group of white male employees who were determined to be negative outliers with no legitimate explanation for their lower pay but did not receive a pay adjustment. The allegation under such a scenario would be that making adjustments to only females and POC, while excluding white males, would constitute actionable discrimination under either or both of the Equal Pay Act of 1963 ("EPA") or Title VII.[245]

[245] These claims are not theoretical. *See e.g.*, *Rudebusch v. Hughes*, 313 F.3d 506, 513 (9th Cir. 2002) (class of white male professors sued university-employer under Title VII but not the EPA, challenging one-time base pay adjustments given to certain women and minority faculty by Northern Arizona University in an effort to achieve pay equity after a jury finding that a manifest imbalance existed with respect to pay of women and minority faculty); *Maitland v. Univ. of Minnesota*, 155 F.3d 1013 (8th Cir. 1998) (male university faculty member sued university under Title VII challenging implementation of consent decree that settled a gender discrimination class action that provided for

As further detailed below, there is a risk of liability for a company if it chooses to provide pay adjustments to female and POC negative outliers but exclude white male negative outliers. Moreover, attempting to defend that scenario if challenged would also require the company to admit that manifest imbalance in the pay of females and POC and white males. That admission could have collateral consequences for litigation by those adjusted arising from past pay differences.

1. Legal Risks Under the EPA

A male plaintiff who did not receive a salary adjustment could seek to establish a *prima facie* case of EPA discrimination by comparing his unadjusted wage to the adjusted wage of a woman who works in a job requiring equal skill, effort and responsibility under similar working conditions. The company would then need to establish one of the four articulated affirmative defenses under the EPA. The first three defenses (seniority system, merit system, system which measures earnings by quantity or quality of production) would be inapplicable. And several courts have held the fourth affirmative defense (a differential based on any other factor other than sex) to be inapplicable under similar circumstances.[246]

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the distribution of three million dollars in salary increases to women); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 674 (4th Cir. 1996) (five male professors challenged pay raises under Title VII that university gave to its female faculty based on a voluntary salary equity study conducted at the university).

[246] *See Bd. of Regents v. Dawes*, 522 F.2d 380, 384 (8th Cir. 1975) (holding that university violated the EPA when it increased female teachers' salaries via formula in an effort to guard against EPA violation, but failed to apply the formula to male teachers: "[W]hen a University establishes and effectuates a formula for determining a minimum salary schedule for one sex ..., it is a violation of the Equal Pay Act to refuse to pay employees of the opposite sex the minimum required under the formula."); *Volpe v. Nassau Cty.*, 915 F. Supp. 2d 284, 295 (E.D.N.Y. 2013) (analyzing payments made via settlement agreement made to females only in a particular job role: "Although under no obligation to make backpay or other types of payments to any PCOs or PCOSs when they chose to remit such payments to female PCOs or PCOSs to settle the Ebbert case, once they elected to pay the females, those payments had to be applied to both sexes equally."); *Klask v. Nw. Airlines, Inc.*, 1989 WL 308010, at *5 (D. Minn. Aug. 28, 1989) (rejecting defendant's "factor other than sex" defense as a matter of law where defendant made payments to female cabin attendants to equalize their pay with another category of employees pursuant to a court judgment, but failed to do so for male cabin attendants). *But see Ende v. Bd. of Regents of Regency Universities*, 757 F.2d 176, 177 (7th Cir. 1985) (holding that the fourth affirmative defense could apply in circumstances where an employer increases the salaries of women to "bring the women to a salary level they would have reached in ordinary course if they had been men and not subjected to sex discrimination" and where "[a]pplying it to men would only serve to continue the discriminatory differential, albeit at a higher level of compensation."). *Ende* would be distinguishable provided that there has been no finding that women would have reached the "proper" salary level had they been men. Moreover, unlike in *Ende*, increasing the salary of male negative outliers would not "continue the discriminatory differential," it would simply bring them into alignment. Finally, relying on this case would be tantamount to admitting that women are underpaid because of discrimination based on their gender, which of course has a whole host of other consequences.

Unlike Title VII, there is no "affirmative action plan" defense to liability available under the EPA. Any defense under the EPA must be based on a factor other than sex, and, as discussed below, asserting the "affirmative action plan" defense by its nature admits that a manifest imbalance in pay exists with respect to females as compared to males. Thus, there would be a risk of liability pursuant to the EPA.[247]

2. Legal Risks Under Title VII

A white male plaintiff who did not receive a salary adjustment would seek to establish a *prima facie* case of discrimination by pointing to the decision to give women and POC the pay adjustment while excluding similarly situated white men. The burden would then shift to the company to articulate a nondiscriminatory rationale for its decision. "The existence of an affirmative action plan provides such a rationale."

Affirmative action plan defenses are analyzed under the analytical framework of *Johnson/Weber*, pursuant to which an employer defending an affirmative-action plan against a Title VII reverse-discrimination challenge needs to show that (1) there is a "manifest imbalance" in a traditionally segregated job category and (2) the plan does not "unnecessarily trammel" interests of adversely affected third parties.[248]

In order to determine whether the company can, as a legal matter, assert the existence of an affirmative action plan defense, one must first determine whether, in fact, the contemplated pay adjustments constitute an affirmative action plan.[249] If the pay adjustments are considered an affirmative action plan, then the affirmative action defense would likely be analyzed under *Johnson/Weber*; if not, a more stringent "strong-basis-in-evidence" standard applies.[250]

Affirmative action plans are "intended to provide ex ante benefits to all members of a racial or gender class."[251] Plans intended to provide "make-whole relief" and which are intended to provide "ex

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[247] With respect to damages, U.S.C. § 216(b) provides that recovery for an EPA violation consists of the amount of underpayment and "an additional equal amount as liquidated damages." However, "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [EPA], the court may, in its sound discretion" reduce the award of liquidated damages (but not the underlying damages award). 29 U.S.C. § 260. There is no statutory authority for an award of damages for emotional distress, pain and suffering, or lost opportunity. There is also no provision permitting punitive damages for willful violations.

[248] *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

[249] *United States v. Brennan*, 650 F.3d 65, 97 (2d Cir. 2011) ("[T]o determine whether a voluntary, private, race- and sex-conscious employer action is eligible for the *Johnson/Weber* defense, courts should ask whether the race- and sex-conscious action constitutes an affirmative action plan at all.").

[250] *Ricci v. DeStefano*, 557 U.S. 557 (2009)

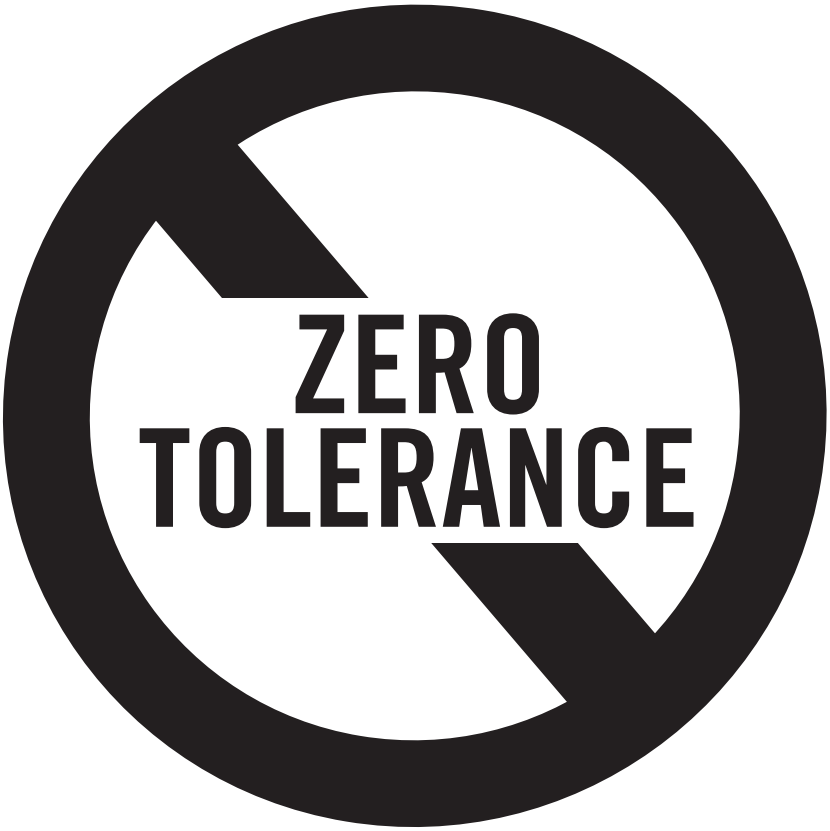
[251] *Brennan*, 650 F.3d at 104.

post benefits to specified individuals who have suffered discrimination" are not qualifying "affirmative action" plans for purposes of the *Johnson/Weber* defense. Here, the company would not be providing retroactive or make whole relief, instead it would be providing ex ante benefits to all women and POC who are negative outliers. Thus, the contemplated pay adjustments would likely be considered "affirmative action" plans subject to the *Johnson/Weber* analysis.

Depending on the extent of the statistical variation between the pay of females and POC versus white males found in the study performed by the company, there could be an argument that the manifest imbalance factor of the *Johnson/Weber* analysis would be satisfied. However, this is a question of fact and would depend on a number of factors, including whether all variables were accounted for by the regression analysis. In litigation over whether an employer can rely on the affirmative action plan defense, white males would argue that important variables were omitted from the multiple regression analysis and as such the study is not sufficient to establish manifest imbalance as a matter of law. At the very least, the company would have a hard time succeeding on a motion for summary judgment with respect to this issue.[252] Moreover, in order to defend on the basis of an affirmative action plan defense, the company would have to admit and assert that a manifest imbalance in pay exists between white men and women and POC, with multiple collateral consequences associated with that kind of admission. Thus, there would be a risk of liability pursuant to Title VII and the assertion of the affirmative action plan defense could have adverse consequences.[253]

[252] *See Smith*, 84 F.3d at 677 ("Given the number of important variables omitted from the multiple regression analysis, and the evidence presented by the appellants that these variables are crucial, a dispute of material fact remains as to the validity of the study to establish manifest imbalance.").

[253] Although the one-time pay adjustments could pass muster pursuant to an affirmative action defense (depending on the facts), choosing not to adjust salaries of white male outliers could lead to liability in the future. White males who are paid less than similarly situated POC and females may have a cause of action for pay bias under Title VII. Thus, failing to adjust the salaries of underpaid white males could lead to a situation in the future where white men in the company are underpaid as compared to women and POC, which could lead to a finding of reverse-discrimination. *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 475 (7th Cir. 2012).



Best Practices for Combating Sex-Based Harassment in the Legal Profession

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THE PROBLEM OF SEX-BASED HARASSMENT AND THE NEED FOR ZERO TOLERANCE

In 1992, the American Bar Association, in response to an effort spearheaded by the ABA Commission on Women in the Profession, passed a resolution to work to eradicate sex-based harassment in the legal profession. The ABA recognized at the time that sexual harassment was a "serious problem" in the legal profession, and elsewhere.[1] Twenty-four years later, on August 8, 2016, the ABA House of Delegates voted to amend the definition of professional misconduct under Model Rule 8.4 to include harassment and discrimination on the basis of protected

characteristics, such as sex.[2] The Model Rules are, of course, nonbinding and are "promulgated by the ABA as a model for states to use as they establish or amend their own ethics rules,"[3] and are but one effort to address the continued prevalence of sex-based harassment in the legal profession. Still, adoption of Rule 8.4(g) recognizes the realities of discrimination and in particular, sex-based harassment, in the legal profession and provides a framework for victims that may be more accessible than many of the state rules (and antidiscrimination laws) that came before it.

Despite the ongoing efforts of the ABA and the legal community to address this issue, sex-based harassment in the field of law continues to persist.[4] Statistical data in employment, educational, and professional settings, as well as substantial anecdotal evidence, reveal that a significant number of lawyers and legal professionals have experienced some form of sex-based harassment in their careers. While sex-based harassment continues to take the traditionally recognized forms of overt inappropriate comments and actions, it also exists as often-unrecognized microinequities resulting from conscious and unconscious biases. These behaviors, even if they do not create legal liability or subject the offending attorney to disciplinary action, still perpetuate inequality and negative stereotypes that discourage women from remaining in the profession and taking on leadership roles, and ultimately, diminish the prestige of the legal profession.

Women represent approximately 45 percent of associates in private practice, but make up only 21.5 percent of non-equity partners and only 18 percent of equity partners—only 2 percent higher than percentages held more than a decade ago—and only 24.8 percent of general counsel at Fortune 500 companies.[5] Now that close to 50 percent of law school graduates are women,[6] how is it possible that the number of women holding top legal jobs remains so low? A variety of factors account for the lack of progress, but a major reason is that women *still* do not feel

welcomed or valued in many legal work environments, and continue to be deterred and undermined by inappropriate advances and sex-based harassment.

Although studies have shown that sex-based harassment, through training and policy enforcement, is less reported today than in 1992,[7] data and anecdotal accounts demonstrate that harassment still is a major problem for the legal profession.[8] A significant percentage of female lawyers and female court personnel continue to experience or observe sexual harassment,[9] including sexual propositions, lewd comments, and physical groping.[10] Depending on the study or survey cited, as many as 50 percent of female lawyers report experiencing sexual harassment in their present or previous jobs,[11] and nearly three-quarters of women lawyers believe harassment is a problem in their workplace.[12] Taking into account underreporting and fear of retaliation, the numbers likely are much higher.[13] The psychological costs experienced by victims of sex-based harassment, such as anxiety, depression, lowered job satisfaction, and other stress-related conditions, are real and severe.[14]

The legal profession presents unique challenges to the problem of sex-based harassment.[15] Law firms (small, mid-size, and large), corporate counsel, legal services organizations, and even military practice[16] rely on those in leadership at the organization to set the tone on sexual harassment policies and to monitor relationships that, if unchecked, could permit sex-based harassment to go unreported and unaddressed. Those structures, as well as other impediments, can make it difficult for victims of sex-based harassment to seek redress.

The power structures in firm partnerships often perpetuate sex-based harassment by shielding harassers and silencing victims. There are far more male partners receiving higher pay and more lucrative assignments than women partners, and women remain tokens on management and compensation committees.[17] Being in a weaker position to start with, victims often do not

report harassment because the harasser may be the victim's direct manager, mentor, or a key figure in the firm, and because human resource departments, if they exist at firms, often have little or no autonomy. Given the advantages of maintaining a predominantly male "boys club" of partners, it is not surprising that male partners have a vested interest in protecting each other and turning a blind eye to instances of harassment.[18] In a recent study by Major, Lindsey and Africa on partner compensation in the Am Law 200, it was revealed that approximately 24 percent of partners surveyed felt that male "cronyism" contributed to the assignment of work and origination credit.[19] Indeed, firms frequently fall short when investigating or punishing harassers, particularly if the offender is a "rainmaker" or is in a firm leadership position.[20]

Compounding the problem, it is quite common for the victim to be asked to leave the firm after a complaint or an action has been brought. Not unlike rape cases, the victims of sexual harassment become the pariahs—and their own behavior suspect.[21] Often, harassment victims are abandoned by fellow associates or partners, their billable time drops off, and they begin to fail at the firms at which they previously had succeeded. It is common for victims to settle claims under strict confidentiality, and to depart without references or another position secured. Due to preferences and practices of many firms, equivalent lateral positions may be difficult to find and frequently come with restrictions or setbacks to advancement or partnership tracks.[22] Weighed against the stigma, including damage to career and partnership prospects, many opt not to give their employer a public opportunity to blame the victim by bringing a claim.[23]

In addition, binding arbitration clauses in legal employment and partnership agreements are on the rise, making a public lawsuit less of a threat. Without public accountability for the firm and named partners, law firms have little incentive to have reasonable polices (some firms have none), or to enforce them

to protect victims and punish perpetrators. Law firm partners have an additional hurdle when bringing a claim against a law firm, as Title VII generally protects employees, not partners, from workplace discrimination.[24]

Even when employees do pursue their claims, the courts rarely are a refuge. Unfortunately, there are instances where judges have expressed reluctance to police their own profession in matters they think should be handled internally.[25] Furthermore, their own personal biases, along with gender, age, and political affiliation, can greatly affect the outcomes of sexual harassment cases, usually with negative outcomes for plaintiff victims.[26] This is to say nothing of the public shaming that so frequently accompanies public discussion of sex-based harassment lawsuits.

The persistence of sex-based harassment in the legal profession is not without its costs to employers as well. These costs include decreased employee morale and productivity, increased employee turnover, impaired recruitment, loss of reputation, and legal liability.[27] Indeed, the cost of sex-based harassment to employers remains high. In January 2016, a Los Angeles jury awarded Minakshi Jafa-Bodden, a female lawyer harassed by yoga guru Bikram Choudhury, $924,500 in compensatory damages and $6.4 million in punitive damages.[28]

Whereas employers in general are guilty of minimizing women's complaints of harassment, law firms in particular, and the profession as a whole, have been slow to set up proper systems for reporting, training, and dispute resolution in order to combat the problem.[29] What we do know is that sex-based harassment perpetuates the submissive status of women, decreases productivity, and is costly for both employers and employees.[30] It therefore is in the best interest of legal employers to reduce, correct, and prevent problems of sexual harassment before the harassment reaches the standard of "severe or pervasive"[31] actionable under the law,[32] and to instead address all forms of improper sex-based conduct.

As lawyers, our continued ambivalence, and at times, delinquency, in this area is unacceptable. It is our collective duty as a profession to make sure that we are setting the standard for safe and welcoming workplaces, and to do everything we can to combat sexual harassment. Reducing instances of harassment and making the legal workplace a more hospitable one for women is a win-win for retaining talented and successful women lawyers. It is time for the legal profession to take a hard look at itself, and to adopt a zero tolerance approach to sex-based harassment.

Endnotes

1. ABA House of Delegates, Recommendation 117 (Feb. 1992).
2. Model Rules of Prof'l Conduct R. 8.4(g) (2016); *see also* http://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual_meeting_20161.html (video of Aug. 8, 2016, meeting of House of Delegates) (last visited Feb. 28, 2017).
3. Hon. Louraine C. Arkfeld, *Amending Rule 8.4 of the Model Rules of Professional Conduct*, 1 ABA Voice of Experience, no. 7, *available at* https://www.americanbar.org/publications/voice_of_experience/20160/july-2016/amending-rule-8-4-of-the-model-rules-of-professional-conduct.html (last visited Feb. 28, 2017).
4. Janet E. Gans Epner, *Visible Invisibility: Women of Color in Law Firms*, ABA Comm'n on Women in the Profession 10 (2006), https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility.authcheckdam.pdf (finding that between 47 and 49 percent of women reported being subjected to harassment while working in a law firm setting).
5. ABA Comm'n on Women in the Profession, *A Current Glance at Women in the Law* 2 (January 2017), https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf; Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues: Report of the*

Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms, Nat'l Assoc. of Women Lawyers (October 2015), http://www.nawl.org/p/cm/ld/fid=506 [hereinafter 2015 NAWL Survey].

6. ABA Comm'n on Women, *supra* note 5.
7. Amanda Shelley, *Sexual Harassment Trends in the Legal Industry: Policy Enforcement & Targeted Sexual Harassment Training Are Key*, The Network Blog (Nov. 6, 2014), https://www.tnwinc.com/10538/sexual-harassment-training-and-trends-legal-industry/.
8. *See e.g.*, Chechelnitsky v. McElroy, Deutsch, Mulvaney & Carpenter, LLP, No. 01777 (S.D.N.Y. Mar. 5, 2015); Jane Roe v. The Law Offices of Adelson, Testan, Brundo, Novell & Jimenez, Corp., No. BC560465 (L.A. Sup. Ct. C.D. Oct. 14, 2014); Marchuk v. Faruqi & Faruqi, LLP, et al., No. 01669 (S.D.N.Y. Mar. 13, 2013); Lauren Stiller Rikleen, *Solving the Law Firm Gender Gap Problem*, Harv. Bus. Rev., Aug. 20, 2013; Illinois Attorney Registration and Disciplinary Commission, *In re* Paul M. Weiss, Commission No. 08 CH 116 (attorney disbarred after being found to have engaged in criminal conduct of a sexual nature against women, including employees), https://www.iardc.org/rd_database/rulesdecisions.html; *In re* Depew, 237 P.3d 24, 26 (Kan. 2010), *reinstatement granted*, 284 P.3d 279 (Kan. 2012) (lawyer temporarily suspended for sexual harassment of at least five female district court employees); *see also* sources cited *infra* notes 12–15.
9. *See* Women Lawyers of Utah, *The Utah Report: The Initiative on the Advancement and Retention of Women in Law Firms* (Oct. 2010), http://ms-jd.org/files/wlu_report_final.pdf ("37% of women in firms responded that they experienced verbal or physical behavior that created an unpleasant or offensive work environment[, and] 27% of the 37% indicated that the situation became serious enough that they felt they were being harassed (approximately 10% of women in firms). The vast majority (86%) of those reporting harassment identified sex as the basis for the harassment."); ABA Comm'n on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* 18–19 (2001) (citing survey results indicating that one-half to two-thirds of women

lawyers experienced or observed sexual harassment); Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 894 (2005); Martha Neil, *Hidden Harassment: Law Firms and Disciplinary Authorities Look for Ways to Fight Sexual Misconduct*, 92-Mar. A.B.A. J. 43 (2006); Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 837 (2004) ("Female lawyers around the country report a significant incidence of gender-based discrimination and incivility against them by judges, court personnel, other lawyers, and clients."); Lorraine Dusky, *Still Unequal: The Shameful Truth About Women and Justice in America* 223–24 (1996) (half of female litigators, 43 percent of law firm lawyers); Lynn S. Glasser, *Survey of Female Litigators: Discrimination by Clients Limits Opportunities*, *in* THE WOMAN ADVOCATE: EXCELLING IN THE 90S 55 (Jean MacLean Snyder & Andra Barmash Greene, eds., 1995) (55 percent of woman litigators reported harassment); Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 176–77 (1994) (citing surveys); Thom Weidlich & Charise K. Lawrence, *Sex and the Firms: A Progress Report*, NAT'L L.J., Dec. 20, 1993, at 1 (51 percent of female lawyer respondents reported having experienced sexual harassment on the job); David N. Laband & Bernard F. Lentz, *Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594 (1998) (66 percent of women in law firms and 46 percent of women in corporate and public sector organizations); Catherine E. Shanelaris & Henrietta Walsh Luneau, *Ten Year Gender Survey*, N.H. BUS. J. 56–78 (Mar. 1998) (one-half to two-thirds of female lawyers in New Hampshire reported sexual harassment); Richard C. Kearney & Holley Taylor Sellers, *Gender Bias in Court Personnel Administration*, 81 JUDICATURE 8 (1997) (49 percent of female court employees in Missouri reported instances of sexual advances to obtain job benefits; 35–40 percent of Rhode Island women experienced sexual comments, touching, or disrespectful interest; 27 percent of Mississippi women experienced

unwanted verbal or physical harassment); Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity*, 32 Ind. L. Rev. 1167, 1172–73 (1999) (describing reported conduct reflecting gender bias and sex-based harassment by male attorneys and judges against female lawyers in the courtroom and the workplace); *see also* Joan Brockman, Gender in the Legal Profession 115–19 (2001) (34 percent of surveyed Canadian women lawyers reported sexual harassment by lawyers, 12 percent by judges, and 10 percent by clients). Of course, such surveys, based on self-reporting, do not necessarily indicate how much of the conduct labeled harassment would be sufficiently severe or pervasive to be legally actionable. *See generally* Margaret A. Crouch, Thinking about Sexual Harassment: A Guide for the Perplexed 102–07 (2001) (discussing problems with survey methodology).

10. *See, e.g.*, Jane Roe v. The Law Offices of Adelson, Testan, Brundo, Novell & Jimenez, Corp., No. BC560465 (L.A. Sup. Ct. C.D. Oct. 14, 2014); Marchuk v. Faruqi & Faruqi, LLP, No. 01669 (S.D.N.Y. Mar. 13, 2013); Illinois Attorney Registration and Disciplinary Commission, *supra* note 8; *In re* Depew, 237 P.3d 24, 26 (Kan. 2010), *reinstatement granted*, 284 P.3d 279 (Kan. 2012) (lawyer temporarily suspended for sexual harassment of at least five women employed in the district court where counsel practiced); EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C., 2006 WL 2660981 (E.D.N.Y. 2006) (allegations that law firm failed to stop sexual harassment so severe that employee was forced to quit); Woods v. Chubb & Son, 2005 WL 3271486 (9th Cir. 2005); Mellino v. Kampinski Co., L.P.A., 837 N.E.2d 385, 389 (Ohio App. 2005) (sexual harassment allegations by law firm's receptionist); Cincinnati Bar Assn. v. Young, 731 N.E.2d 631 (Ohio 2000); Wynn v. Mass. Comm'n Against Discrimination, 729 N.E.2d 1068 (Mass. 2000); Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510 (1st App. Dist. 1998); Rochester v. Fishman, 1997 WL 24720 (N.D. IL. 1997); People v. Lowery, 894 P.2d 758 (Colo. 1995); Reed Abelson, *By the Water Cooler in Cyberspace, the Talk Turns Ugly*, N.Y. Times, Apr. 29, 2001, at A4, 24; Bill Kisliuk, *A Tale of Destruction*, S.F. Recorder, Mar. 5, 1997, at 1; Pfenninger, *supra* note 9, at 176–77, 179–80, 212;

Joanna Grossman, *Sexual Harassment in Law Firms: Why It Still Exists, and Why Firms Haven't Taken Steps to Prevent It and to Decrease Their Own Liability*, FindLaw Nov. 10, 2000), http://writ.news.findlaw.com/grossman/20001110.html; Paul Braverman, *Manhandled*, Am. Law., Aug. 2002, at 73; *Hot Catalog, Hot Judge*, Nat'l L. J., Apr. 22, 2002, at A13; Janet E. Gans Epner, *Visible Invisibility: Women of Color in Law Firms*, ABA Comm'n on Women in the Profession 10–11 (2006), https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility.authcheckdam.pdf. Additionally, the website Above the Law compiles anecdotal evidence of workplace sex-based harassment from female lawyers and legal workers. *See* The Pink Ghetto Archives, abovethelaw.com/tag/the-pink-ghetto/.

11. Rachel Oliver, *Are Gender Schemas Still Shaping Lives of Women Lawyers*, Ms. JD (June 6, 2013), http://ms-jd.org/blog/article/are-gender-schemas-still-shaping-lives-of-women-lawyers; *Sexual Harassment: What If It Happened at Your Firm?*, FindLaw, http://careers.findlaw.com/legal-career-assessment/sexual-harassment-what-if-it-happened-at-your-firm.html (last visited Feb. 25, 2016).
12. Martha Neil, *Hidden Harassment*, *supra* note 9; Eyana J. Smith, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. Pa. J. Lab. & Emp. L. 789, 800 (2004) (sexual discrimination also has had the devastating result among lawyers of forcing women to leave the law completely); Grossman, *supra* note 10.

    A recent survey of male and female attorneys by The Center for WorkLife Law found that, over the course of a year, 82 percent of women (and 74 percent of men) reported experiencing sexist comments, stories, or jokes at least once; 13 percent of women believed they had lost opportunities because they had rebuffed sexual advances from co-workers or superiors; 27 percent of women reported receiving unwanted romantic or sexual attention, or unwanted attempts to touch them; and 6 percent of women reported feeling bribed or threatened for not engaging in sexual behavior with a work colleague. Joan C. Williams, unpublished study conducted by The Center for WorkLife Law

at UC Hastings College of the Law (2016). Note, of course, that women—like men—may not only be victims of harassment, but may engage in it themselves, although it is far less likely.

13. *See* Jillian Berman & Emily Swanson, *Workplace Sexual Harassment Poll Finds Large Share of Workers Suffer, Don't Report*, Huff-Post (Aug. 27, 2013), http://www.huffingtonpost.com/2013/08/27/workplace-sexual-harassment-poll_n_3823671.html (although 32 percent of respondents from a variety of professions reported being sexually harassed, 70 percent of those respondents never reported it); James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis* 17 Basic & Applied Social Psychology (1995) (surveys across a number of industries indicate that fewer than 10 percent of women who experience sex-based harassment make any formal complaint).
14. Emily A. Leskinen, Lilia M. Cortina, & Dana B. Kabat, *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, 35 Law & Hum. Behav. 25, 36 (2011) ("Among attorneys, gender-harassed women (compared to nonharassed women) reported lower satisfaction with professional relationships and higher job stress, above and beyond the effects of race and job tenure."); Kerry Segrave, The Sexual Harassment of Women in the Workplace: 1600 to 1993 203 (1994); Laband & Lentz, *supra* note 9, at 600–04; L. Camille Hebert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. Kan. L. Rev. 341, 387–88 (2005) (empirical evidence suggests that women are more likely than men to suffer significant negative personal and work consequences as the result of sexual harassment); Latourette, *supra* note 9 ("[I]nequities do exist despite the popular belief that women are no longer discriminated against in the legal profession. . . . The facts show that the odds of a woman being made partner is less than one third of the odds for a man being named partner.").
15. *See generally* Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It's Time to Make It Stop*, 255 N.Y.L.J. (Mar. 4, 2016), *available at* http://www.outtengolden.com/sites/default/files/nylj-030416-wsl.pdf.

16. Similarly, the use of the term "firm" throughout this manual should be read as a shorthand for law firms of all sizes, as well as for other types of legal employers more generally, such as corporate counsel, legal services organizations, and the military.
17. Jeffrey Lowe, *2016 Partner Compensation Survey*, Major, Lindsey & Africa 15 (2016), https://www.mlaglobal.com/publications/research/compensation-survey-2016 [hereinafter 2016 MLA Survey]; 2015 NAWL Survey, *supra* note 5, at 10.
18. Jane Gross, *When the Biggest Firm Faces Sexual Harassment Suit*, N.Y. Times, July 29, 1994, http://www.nytimes.com/1994/07/29/us/when-the-biggest-firm-faces-sexual-harassment-suit.html?pagewanted=all.
19. 2016 MLA Survey, *supra* note 17, at 35.
20. Julie A. Pace, *Harassment, Discrimination & Retaliation Time to Audit Your Firm*, Ariz. Att'y, 10, 12 (Sept. 2007).
21. Deborah Edros Knapp, Robert H. Faley, Steven E. Ekebert, & Cathy L.Z. Dubois, *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 Acad. Mgmt Rev. 687, 702 (1997).
22. *See generally* Lazar, *supra* note 15.
23. *Id.*
24. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 450–51 (2003); E.E.O.C. v. Sidley Austin Brown & Wood, 315 F.3d 696, 702 (7th Cir. 2002) (demoted partners were "employees" because they lacked any meaningful control over the firm's affairs).
25. *See, e.g.*, Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser, LLP, 153 F. Supp. 2d 219 (S.D.N.Y. 2001); Sier v. Jacobs Persinger & Parker, 714 N.Y.S.2d 283, 285 (App. Div. 2000) (reducing emotional distress award against law firm); K.S. v. ABC Prof'l Corp., 749 A.D.2d 425 (N.J. Super. Ct. App. Div. 2000) (imposing a protective order preventing plaintiff from deposing partners about their sexual relationships with other firm employees); *but see* Fitzgerald v. Ford Marrin Espositio Whitmeyer & Gleser, LLP, 29 F. App'x 740 (2d Cir. 2002).
26. Carol T. Kulik, Elissa L. Perry, & Molly B. Pepper, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal*

Sexual Harassment Case Outcomes, 27 Law & Hum. Behav. 69 (2003); Daniel L. Chen & Jasmin Sethi, *Insiders and Outsiders: Does Forbidding Sexual Harassment Exacerbate Gender Inequality?* (Duke Law Sch., Working Paper No. 226892, Oct. 2011) .

27. ABA Presidential Task Force on Gender Equity and the Comm'n on Women in the Profession, *Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013), https://www.americanbar.org/content/dam/aba/administrative/women/power_of_purse.authcheckdam.pdf (discussing costs to businesses of unwanted gender-based attrition); Deborah L. Rhode, Access to Justice 28 (2004) ("Sexual harassment lawsuits . . . were once regarded as unnecessary and frivolous . . . until studies revealed that the average Fortune 500 company lost approximately six million dollars in turnover, worker absences, and lost productivity as a result of these apparently insignificant injuries" (citations omitted)).
28. *See* Jafa-Bodden v. Choudhury, Case No. BC512041 (Los Angeles Sup. Ct. Feb. 22, 2016), *as modified*, (Los Angeles Sup. Ct. Apr. 13, 2016) (reducing punitive damages award to $4.6 million).
29. Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession*, ABA Comm'n on Women in the Profession 7–8 (2001).
30. *Id.*
31. *See generally* Jana L Raver & Michele J. Felgand, *Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48 Acad. of Mgmt. J. 387 (2005).
32. Megan E. Wooster, *Sexual Harassment Law—The Jury Is Wrong as a Matter of Law*, 32 U. Ark. Little Rock L. Rev. 215, 240–41 (2010).

2

THE LEGAL FRAMEWORK FOR SEX-BASED HARASSMENT AND BULLYING

What Is Sex-Based Harassment?

Title VII of the Civil Rights Act of 1964, as well as many state and municipal laws, prohibits sex-based harassment in the workplace.[1] The Equal Employment Opportunity Commission (EEOC) has issued authoritative guidelines on sexual harassment under Title VII, imposing on employers "an affirmative duty" to prevent and eliminate sexual harassment.[2] The guidelines define sexual harassment as follows:

> Unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when any one of three criteria is met: (1) Submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment; (2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.[3]

The EEOC has since made clear that "harassment not involving sexual activity or language may also give rise to Title VII liability . . . if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex,"[4] and that the employer may be vicariously liable for such harassment.[5] Prohibitions on such conduct apply to supervisors, co-workers, peers, clients, judges, professors, students, and vendors.[6]

A variety of abusive behaviors that are directed at individuals on the basis of sex may constitute sex-based harassment.[7] Examples include unwanted touching, groping, or sexual advances; quid pro quo requests for sexual favors; or demeaning, condescending, or sexualized comments or jokes. With increasing frequency, sex-based harassment has taken on more subtle forms, such as interruptions or dismissive comments, comments on appearance or decorum, or subtle threats or intimidations. Inappropriate behavior can come from colleagues, adversaries, or even judges; many women anecdotally report that opposing counsel and court personnel, including judges, still refer to them using pet names or mistake them to be secretaries or paralegals.

In Chapter 5 of the manual, we provide guidance on developing and implementing workplace policies against sex-based

harassment. One key consideration in developing that policy is how to define "sex-based harassment." What will constitute legally actionable harassment often is situational and fact specific. However, if the goal is to prevent and eliminate sex-based harassment from the legal profession, practitioners should look beyond what is required by law, to policies that develop a culture of zero tolerance of sex-based harassment. The following formulation for defining sex-based harassment has been suggested by Fran Sepler, a human resources consultant and expert on workplace harassment investigations:

> Sex-based harassment means inadvertent or intentional behavior, language, humor, displays or other acts that are a) directed at a person because of their sex, sexual identity or sexual orientation or b) offensive based on content that is sexual in nature or demeaning towards individuals based on sex, sexual orientation and sexual identity—to the degree it affects someone's ability to perform their job or to be reasonably comfortable in the workplace. This includes conduct that may not yet rise to a level where it is actionable.[8]

This definition is consistent with the ABA's recent amendment to Model Rule 8.4(g), which now defines "professional misconduct" to include any "[c]onduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . sex, . . . sexual orientation, gender identity, [or] marital status . . . in conduct related to the practice of law."[9]

Legal employers also should be mindful of the various and subtle ways sex-based harassment may manifest. For example, although not per se illegal in most jurisdictions, gender bullying is prevalent in the legal workplace and is often a precursor to more severe forms of sex-based harassment. There are also a host of unconscious behaviors that perpetuate stereotypes and

sex-based treatment that many fail to recognize in themselves. Legal employers therefore are advised to adopt bias training and institute harassment policies that prohibit a wide scope of inappropriate workplace conduct, as such conduct is itself harmful to employees, and often is a precursor to more severe behavior.

Important Case Law

It was not until 1986, when the Supreme Court decided *Meritor Savings Bank v. Vinson*, that sex-based harassment was recognized as a form of illegal sex discrimination actionable under Title VII of the Civil Rights Act of 1964.[10] The Court interpreted Title VII's language prohibiting discrimination in the "terms, conditions, or privileges of employment" as covering the psychological, as well as financial, aspects of employment. The Court held that Title VII gives "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," even where tangible employment benefits such as pay and promotion are not affected.[11]

Seven years later, in *Harris v. Forklift Systems, Inc.*, the Supreme Court again focused on harassment that creates a hostile work environment.[12] In *Harris*, the Court held that conduct need not seriously affect a complainant's psychological well-being to be actionable. Rather, hostile work environment harassment violates Title VII so long as it is both subjectively offensive to the complainant and objectively offensive to "a reasonable person."[13] Factors relevant in determining whether an environment is hostile or abusive include "the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[14]

In 1998, in *Oncale v. Sundowner Offshore Services, Inc.*, the Court held that same-sex harassment—that is, harassment of a man by a man, or harassment of a woman by a woman—can be actionable under Title VII.[15]

That same year, in *Faragher v. City of Boca Raton*[16] and *Burlington Industries v. Ellerth*,[17] the Court clarified the circumstances under which employers will be held liable for harassment committed by their agents and employees. Specifically, the Supreme Court articulated an affirmative defense for employers in sexual harassment cases if the employer can demonstrate by a preponderance of the evidence that:

> (a) [the employer] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[18]

The Court, however, also held that, "[no] affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable assignment[.]"[19]

Recently, in *Vance v. Ball State University*, the Supreme Court clarified that an employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim.[20] This standard requires that a person have the power to hire, fire, demote, promote, transfer, or discipline the victim. It is not sufficient that an employee merely have the ability to exercise significant direction over the victim's daily work.

Title VII also prohibits employers from retaliating against employees for reporting harassment (or other types of illegal

discrimination) or for filing a charge, testifying, assisting, or participating in Title VII investigations, proceedings, or hearings.[21] Workers who make good-faith reports of sexual harassment are protected from retaliation even if the behavior at issue is determined to not constitute illegal harassment.[22] Interestingly, the number of retaliation complaints filed with the EEOC has more than doubled over the past two decades, with retaliation cases (under Title VII and other statutes) making up 44.5 percent of the EEOC's charge inventory for 2015.[23]

In *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court held that an employer violates Title VII's anti-retaliation protections when it takes action against an employee that would be considered materially adverse by a reasonable employee—that is, when an employer takes retaliatory actions that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."[24] For example, in *Burlington Northern*, the Court held that an employer commits illegal retaliation by assigning an employee who had complained of sex discrimination to a job with less desirable duties, or indefinitely suspending that employee without pay.[25] The Court made clear that Title VII's anti-retaliation protection "extends beyond workplace-related or employment-related retaliatory acts and harm."[26]

Finally, an employee who alleges sex-based discrimination under Title VII need only show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision. Until recently, that same standard applied to Title VII retaliation claims. However, in 2013 the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar* held that, to prove retaliation under Title VII, employees must meet the higher burden of establishing that retaliatory motive was the "but-for" cause of the employer's action.[27]

State Statutes and Rules of Professional Conduct

For women lawyers and other legal professionals in law firms, the available remedies under federal law for sex-based harassment may be limited and there are many impediments to bringing claims. For instance, Title VII applies only to firms of 15 or more employees, and the plaintiff must be considered an "employee" in order to be protected.[28] In addition, courts generally have been reluctant to apply antidiscrimination laws to management decisions of law firms. Legal remedies for harassment also may not be available against opposing counsel, co-counsel, or other attorneys outside of a female attorney's own workplace.[29] Mandatory arbitration clauses incorporated into many law firm agreements and policies also pose an impediment to victims of harassment, as they dispense with many elements of a full and fair hearing, such as more than minimal discovery, a public trial, and appeal rights.

Lawyers and legal professionals may find redress, however, under state or local law, or through local rules of professional conduct. State and local laws that prohibit gender discrimination and harassment may be more protective than their federal counterparts, and often have more lenient jurisdictional requirements. Additionally, before the ABA amended Rule 8.4 this past year,[30] about half of the states already had adopted similar disciplinary rules against sex-based harassment, discrimination, or both.[31] When enforceable, state bar penalties for lawyers who have engaged in sex-based harassment can include suspension or disbarment.[32] Many of those states' ethics rules, however, are drafted so as to offer less protection than ABA Model Rule 8.4(g).

For example, many state rules limit the harassing behavior to the workplace rather than focusing on "conduct related to the profession,"[33] which could exclude harassment that takes place

in a limousine or at a hotel conference, firm retreat, or meeting in a restaurant—all places where harassment typically occurs during the working life of lawyers. Many state ethics rules also demand exhaustion of other state remedies before a complaint can be filed by a lawyer. Given the reluctance of victims of harassment to publicly resolve their claims, such restrictions deter rather than encourage victims of harassment to bring ethics complaints based on sexual harassment. Few states allow victims to bring ethics violations against a firm but rather permit claims only against an individual lawyer, again limiting relief for the victim. Though the breadth of ABA Model Rule 8.4(g) has been criticized by some, it provides the victims of sexual harassment with significantly more redress if adopted by the states in its amended form than most states' current ethic rules. In addition, it may compel greater personal accountability by lawyers and greater incentives for firms to address sex-based harassment and work to prevent it.

Endnotes

1. An employer must have 15 or more employees to be subject to Title VII's prohibitions; many state and municipal laws require fewer employees. 42 U.S.C. § 2000e-2a; 29 C.F.R. § 1604.11.
2. 42 U.S.C. § 2000e-2a; 29 C.F.R. § 1604.11.
3. 29 C.F.R. § 1604.11(a).
4. Equal Employment Opportunity Commission, 1990 Policy Guidance on Current Issues of Sexual Harassment, subsection C(4), https://www.eeoc.gov/policy/docs/currentissues.html.
5. U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, https://www.eeoc.gov/policy/docs/harassment.htm.
6. *See* Freeman v. Dal-Tile Corp., 750 F.3d 413, 423 (4th Cir. 2014) ("[A]n employer is liable under Title VII for third parties creating

a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment.") (internal quotations omitted); Lea B. Vaughn, *The Customer Is Always Right . . . Not! Employer Liability for Third Party Sexual Harassment*, 9 Mich. J. Gender & L. 1, 7 (2002) (61.5 percent of the 553 women litigators surveyed reported being sexually harassed by clients in the previous five years).

7. *See, e.g.*, Smith v. First Union Nat'l Bank, 202 F.3d 234, 242 (4th Cir. 2000) (reversing order granting summary judgment for employer in Title VII suit; "district court failed to recognize that a woman's work environment can be hostile even if she is not subjected to sexual advances or propositions"); Easko v. Howard Cnty., 2005 U.S. Dist. LEXIS 37602, at *8, *12 (D. Md. 2005) (dismissing complaint against individual defendants but allowing Title VII hostile environment claim against county to continue; quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).
8. Fran Sepler, *Sexual Harassment: From Protective Response to Proactive Prevention,* 11 Hamline J. Pub. L. & Pol'y 61 (1990).
9. Model Rules of Prof'l Conduct R. 8.4(g) (2017).
10. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
11. *Id*. at 65.
12. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).
13. *Id*. at 21.
14. *Id*. at 23.
15. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).
16. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
17. Burlington Industries v. Ellerth, 524 U.S. 742 (1998).
18. *Faragher,* 524 U.S. at 807–08.
19. *Id.*
20. Vance v. Ball State University, 133 S. Ct. 2434 (2013).
21. 42 U.S.C. § 2000e-3.
22. *See, e.g.*, Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976 (7th Cir. 2000) (granting summary judgment to defendant law firm on plaintiff secretary's sexual harassment claim, but allowing her retaliation claim to continue).

23. National Partnership for Women & Families, *Women at Work: Looking Behind the Numbers, 40 Years after the Civil Rights Act of 1964* 12 (2004); *see also Sex Discrimination Cases Predominate in Recent Class Actions Filed by EEOC*, 71 U.S.L.W. 2158 (Sept. 10, 2002) (reporting that, of the 52 class action cases filed by the EEOC between October 1, 2001 and June 30, 2002, 25 of the cases included claims of retaliation). Retaliation carries especially great potential for harm because it deters victims from reporting harassment.
24. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).
25. *Id*. at 70–73.
26. *Id*. at 67.
27. Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2522–23 (2013).
28. *See* Hishon v. King & Spalding, 467 U.S. 69, 80 (1984) (Powell, J., concurring) ("The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates."); EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 698 (7th Cir. 2002) (counsel demoted from equity partnership may be "employee"); *see generally* Douglas R. Richmond, *Changing Times and the Changing Landscape of Law Firm Disputes*, J. Prof. Law. 73, 96 (2009).
29. *See generally* Meg Carpentier, *"Not Becoming of a Woman": Lawyers May Finally Get Recourse for Harassment*, The Guardian, Aug. 18, 2016, https://www.theguardian.com/law/2016/aug/18/american-bar-association-harassment-discrimination-lawyers (describing continued discrimination and harassment among lawyers).
30. Model Rules of Prof'l Conduct R. 8.4(g) (extending definition of "professional misconduct" to include any "[c]onduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.").
31. At the time Model Rule 8.4 was amended through passage of Resolution 109 by the American Bar Association, several states

(including Florida, Iowa, Nebraska, New Jersey, Rhode Island, Washington, and other states) had already adopted a form of Rule 8.4 expressly prohibiting discrimination or discriminatory conduct based on sex, while other states (including Illinois, Minnesota, New York, and Ohio) had rules prohibiting unlawful sex discrimination. Vermont already had a rule prohibiting sex discrimination in the employment context. Additionally, Oregon and Wisconsin already had a rule expressly prohibiting sex harassment, and Iowa already had a rule that defined sexual harassment as a form of unlawful, prohibited discrimination. *See* ABA, CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct, updated Sept. 29, 2017, at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf.

32. *See* Iowa Supreme Ct. Att'y Disciplinary Bd. v. Moothart, 860 N.W.2d 598 (2015) (suspending Iowa attorney indefinitely with no possibility of reinstatement for 30 months based on his pattern of sexual harassment of clients and employee); *In re* Tenenbaum, 880 A.2d 1025 (Del. 2005) (three-year suspension of Delaware lawyer for engaging in repeated verbal and physical harassment of clients and employees); *In re* White, 611 S.E.2d 917 (S.C. 2005) (18-month suspension of South Carolina lawyer for multiple instances of sexual harassment of a client); Cincinnati Bar Ass'n v. Young, 731 N.E.2d 631 (Ohio 2000) (affirming two-year suspension of Ohio lawyer for making sexually explicit comments and propositions to a law student under his supervision, and for engaging in verbal and physical abuse toward legal assistants and secretaries).
33. *See* CPR Policy Implementation Committee, *supra* note 31.

Survey of Workplace Conduct and Behaviors in Law Firms

Authored by Lauren Stiller Rikleen, Esq.

WBA
THE WOMEN'S BAR ASSOCIATION

ABOUT THE WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS

Founded in 1978 by a group of activist women lawyers, the Women's Bar Association boasts a vast membership of accomplished women lawyers, judges, and law students across Massachusetts. The WBA is committed to the full and equal participation of women in the legal profession and in a just society. The WBA works to achieve this mission through committees and task forces and by developing and promoting a legislative agenda to address society's most critical social and legal issues. Other WBA activities include drafting amicus briefs, studying employment issues affecting women, encouraging women to enter the judiciary, recognizing the achievement of women in the law, and providing pro bono services to women in need through supporting its charitable sister organization, the Women's Bar Foundation.

For more information, visit **www.womensbar.org.**

ABOUT THE RIKLEEN INSTITUTE FOR STRATEGIC LEADERSHIP

Lauren Stiller Rikleen, founder and president of the Rikleen Institute for Strategic Leadership, is a nationally recognized expert on developing a thriving, diverse and multi-generational workforce. Through her speaking, training, consulting, and writing, she addresses women's leadership and advancement, implementing strategies to minimize the impact of unconscious bias, and strengthening multi-generational teams.

Reports authored by Lauren include the *Report of the Ninth Annual NAWL National Survey On Retention And Promotion Of Women In Law Firms* (2015), and *Closing the Gap: A Roadmap for Achieving Gender Pay Equity in Law Firm Partner Compensation* (American Bar Association's Gender Equity Task Force, 2013). Lauren is the recipient of numerous awards, including the American Bar Association Commission on Women's Margaret Brent Women of Achievement Award and the Lelia J. Robinson Award from the Women's Bar Association of Massachusetts.

Lauren's books include: *Ending the Gauntlet: Removing Barriers to Women's Success in the Law; Ladder Down: Success Strategies For Lawyers From The Women Who Will Be Hiring, Reviewing and Promoting You;* and *You Raised Us, Now Work With Us: Millennials, Career Success, and Building Strong Workplace Teams.* She has also authored more than 170 articles, including topical commentary and op ed pieces in major media outlets.

For more information, visit **www.RikleenInstitute.com.**

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Overview

In the wake of the #MeToo movement and the enormous focus on workplace behaviors that profoundly impact careers, the **Women's Bar Association of Massachusetts** ("WBA"), in partnership with the **Rikleen Institute for Strategic Leadership** ("Rikleen Institute"), developed and distributed a detailed survey to: provide a more nuanced understanding of behaviors that take place in the law firm environment; identify steps that have been taken to address behaviors of concern; and offer recommendations to help law firms provide a safe, respectful and inclusive workplace for all employees.

This survey comes at an important moment, following a deluge of media coverage reporting allegations of workplace sexual harassment. This media coverage, however, should drive every organization to look both at and beyond sexual harassment, and to analyze its own workplace culture with the goal of providing a safe and respectful environment for employees every day.

Understanding whether incidents of sexual harassment occur is one component of that goal. It is also critical to know whether other behaviors that negatively impact workplace culture are prevalent. Every organization should provide a workplace free of fear, intimidation, and any behaviors that diminish or disparage individuals or groups, even where such instances may not meet a legal definition of harassment.

The WBA is proud to be addressing these issues in the legal profession – a high stress environment for everyone. People go to work each day, committed to doing their best work on behalf of their firm's clients, often against a backdrop of long hours, crushing deadlines, complex legal issues, and a host of other considerations, including an ego and emotional investment in the outcome.

This engagement can come at a price. People manifest their stress responses in a variety of ways that can deeply impact those around them. Left unchecked, these behaviors can further facilitate a cycle of negativity that imbues the entire workplace, resulting in a culture that inhibits high performance and employee engagement.

The goal of this survey is to develop a better understanding of whether behaviors exist in the law firm environment that negatively impact lawyers, paralegals, firm administrators, support staff, interns, and law students. In addition, the survey provides specific recommendations for positive change that can be of benefit in any workplace environment.

Methodology and Limitations

Survey questions were developed to provide insight into the possible existence of a range of behaviors that are unwelcome, inappropriate, offensive, or otherwise contribute to an environment that negatively impacts one's workplace experiences. It is important to emphasize that the questions purposefully did not focus solely on behaviors that would meet a legal definition of harassment or that were otherwise legally actionable.

Rather, the WBA was seeking to understand the day-to-day experiences that people may have in the law firm environment and determine whether there are patterns of behaviors that negatively impact an individual's performance and sense of well-being.

The survey was open between February 5, 2018 and April 2, 2018. Responses were sought from individuals who work or had worked in a law office in Massachusetts, whether or not the firm had offices in other locations outside of the Commonwealth.

The survey was distributed in a variety of ways to ensure widespread distribution within the Massachusetts legal community:

1. The WBA posted a description of and link to the study on its website.
2. The WBA distributed 6 email blasts to its 1,500 members, as well as included the survey link in its weekly e-newsletter throughout the time the survey was live. In each communication, the WBA highlighted the importance of and provided a link to the survey.
3. The WBA sent 5 separate emails to the managing Partners of the top 100 law firms in Massachusetts, reaching firms ranging in size from approximately 20 lawyers to more than 500 lawyers, requesting their support distributing the survey link within their firm.
4. Massachusetts Lawyers Weekly, as a sponsoring partner of this research project, ran a story in advance of the survey and then promoted it extensively over several weeks via print, web and email.
5. The Massachusetts Bar Association posted a link to the survey on its website.
6. The WBA and Women's Bar Foundation Board members distributed links to the survey to their own networks, as did many others who knew of the survey and offered to help reach a wide audience.
7. The WBA reached out to many affinity bar associations in the state to enlist their assistance in distributing the survey link to their respective membership.
8. Several allied organizations also distributed the survey link to their members.

Each time the survey was distributed, the link was preceded by language stating that all responses would be confidential and no individuals or firms would be identified. The survey was open to both men and women.

In total, 1,243 individuals responded to the survey. As is normal with surveys of this nature, not all respondents answered every question.

At the outset, the WBA anticipated that law firms – either through firm management or via women's affinity groups – would be willing to distribute the survey internally, particularly in light of the fact that no firms or individuals would be identified. Based on anecdotal responses, firm-wide distribution appears to have occurred only on a limited basis. Although a number of firms made survey links internally available, there were also firms that responded to the WBA's request by stating they were not willing to distribute the survey, notwithstanding the commitment of confidentiality. As a result, that avenue of outreach was less available than had been expected. This proved to be a similar con-

straint with respect to the WBA's hope that there would be wider distribution through other bar association networks or website access.

The WBA is pleased that, notwithstanding these constraints, the results showed widespread interest and a desire by many to share their stories. The constraints, however, also indicate the sensitivity of the topic and the reluctance that some feel about directly addressing these issues in a survey of this nature.

Numerous respondents gave examples of behaviors responsive to each question. The anecdotes that are included give voice to the experiences described. Only quotes that ensure the protection of the respondent's confidentiality were selected (and in a few instances, potentially identifying details that the respondent may have included has been omitted for that same reason). Moreover, quotes that are included are representative of other quotes detailing similar experiences. Quotes that describe unique experiences are also not included for reasons of confidentiality.

Of the respondents who answered the demographic question regarding gender, approximately 80% were women and approximately 17% were male; most of the remaining 3% chose not to specify.

Respondents were also asked to identify their age range to provide insights into which generations were responding to the survey. The distribution was relatively even among the three major generations in the workplace. Of those who answered this question: 36% were Millennials; 30% were in Gen X; and 33% were Boomers. Only 2% were born in the generation prior to the Boomers (Traditionalists).

For each question, respondents were asked if there had been a woman on the firm's highest governing committee at the time of the incident(s); however, because only a very small number responded to this subpart in each of the questions, there is insufficient information to report this data.

Respondents were asked to identify approximately when the behaviors identified in this survey occurred. The purpose was to determine whether the preponderance of the behaviors happened in past decades, as compared to more recent years, to see whether such behaviors were diminishing over time. The time periods that respondents could select were by decade, beginning with 1980-1989.

For each question, a significant percentage of the respondents stated that the incidents occurred between 2010 and 2018. This makes clear that these behaviors are not relics of a past era, but are contemporary concerns.

The highest percentage of affirmative responses in that 2010-2018 time-frame was for question 11, regarding whether others in the firm had spoken with the respondent about workplace behaviors that made them uncomfortable. This response is interesting on two levels. First, it is another indication that negative workplace behaviors remain a challenge. Second, it may also demonstrate that people are more willing to identify and discuss – at least among themselves – concerns about behaviors that, decades ago, were buried in silence.

There are inherent limitations in any method of inquiry. Accordingly, these survey results should not be viewed as offering definitive conclusions about the legal profession overall. Rather, the results offer a snapshot in time that provides a more nuanced understanding of the experiences of individuals in law firms.

As noted above, this survey was not designed to define sexual harassment or otherwise focus only on behaviors that might be considered to fall within a legally actionable definition. It is intended to seek information about the possible presence of a broad range of behaviors that can inhibit employee engagement and diminish an individual's self-worth or ability to perform at work without fear or discomfort, notwithstanding whether such behaviors are technically legal.

The responses to this survey suggest that much work needs to be done to ensure that law firms are providing a workplace culture where negative behaviors are not tolerated and where people can work without fear. The analysis and recommendations that follow are in the spirit of facilitating conversations that can help the legal profession serve as a model for self-reflection and, ultimately, the implementation of practices that allow all personnel to thrive in a safe, respectful, and inclusive environment.

The WBA and the Rikleen Institute for Strategic Leadership are deeply grateful to the women and men who took the time to respond to this important survey. We are confident that their efforts have made a positive contribution to improving the workplace.

Executive Summary

It is critical to highlight at the outset that, although many of the details provided by the respondents are disturbing, they are examples of behaviors that occur in other workplace settings across the country. One need only follow the numerous and comprehensive media accounts covering multiple industries to recognize that too many people face seriously flawed workplace cultures that impact workers on a frequent basis. The legal profession is not alone in facing these challenges.

Lawyers have an opportunity to serve as leaders by addressing these issues in their individual workplace and putting in place mechanisms across the profession that ensure the highest standards are met. Lawyers are the gatekeepers to our justice system; accordingly, they have a unique opportunity to serve as role models to other professions and businesses, to our clients, and to our employees.

Unchecked power imbalance serves as the foundation for and perpetuation of negative and inappropriate behaviors in the workplace. This is a clear theme that emerged from the responses to each question. In the vast majority of responses, the incidents described happened to individuals in the age range of associates, or to others in the firm who were young or were otherwise in a subordinate role.

Power imbalances also emerged in the ways in which negative behaviors were or were not addressed. For example, many of the experiences described by the respondents were perpetrated by partners and, frequently, important rainmakers or senior leaders in the firm. Because of their status, respondents did not report the behaviors, often because they feared retribution or because the people they would report to were involved in the incidents described. Respondents pointed to examples where firms ignored negative behaviors of key partners, or where retribution was taken against those who did report. This was particularly the case where firms did not seem to have a process in place to protect those who reported or felt victimized by alleged negative behaviors.

A number of respondents stated that they discussed the offending incidents with a female partner. In most such cases, the respondent also noted that there was no follow up and that no action was taken. There was generally no indication that the women who were told had a position of authority within the firm or otherwise had any power to follow up without repercussions. Yet we know from the extensive body of research regarding women in the profession that women are under-represented in law firm leadership roles, particularly at the management or executive committee level. It is possible that some of the senior women may themselves have felt vulnerable and without power to act on inappropriate situations brought to their attention. In firms with relatively few, if any, women equity partners and where women may not be serving in key firm management roles, it is difficult to place the expectations for addressing these behaviors on a woman partner, if that partner does not have the authority to take the necessary steps to follow up.

Reporting is also inhibited by the pressure to "go along with" or otherwise accept inappropriate comments as "just a joke". Respondents reported numerous incidents of office conversations that were racist, sexist, homophobic, xenophobic, and offensive to individuals and groups. Too often, however, there was clear pressure in the workplace to avoid being viewed as humorless or as not a team player.

Analysis

1) *Have you ever been the recipient of or copied on unwelcome emails, texts, or instant messages of a personal or sexual nature at work?*

Nearly 38% of the respondents to this question stated that they had been the recipient of or copied on an unwelcome email, text, or instant message of a personal or sexual nature at work. Nearly half stated that the incident occurred between 2010 and 2018.

QUESTION 1	Percentage
Yes	37.50%
No	62.50%

More than two-thirds of those responding to this question were Associates at the time of the incident, 10% were Partners, and approximately 18% were in Administrative, Paralegal, and Support Personnel roles.

Approximately three-quarters of the respondents who provided information about the size of their firm at the time of the incident were in offices with fewer than 50 lawyers.

More than 66% of those responding to this question stated that they did not report the incident.

Reported	Percentage
No	66.67%
Yes	33.33%

Examples of Behaviors Included in Survey Responses to Question 1

Examples of behaviors described in the responses included:

- Numerous examples of sharing images of sexually explicit photos (some photo-shopped to look as though it were a colleague). Many described the distribution of graphic images such as adult porn or links to videos that respondents described as "vulgar" and "inappropriate". In some examples, images seemed meant to ridicule same-sex relationships.
- Numerous examples of emails that included offensive jokes of a sexual nature, or included inappropriate and demeaning remarks about race and gender. Some described emails that ridiculed others or that made the recipients uncomfortable, such as negatively commenting on maternity leaves and commentary defending individuals in the news accused of sexual harassment.
- Partners and senior colleagues (some married or engaged) sending cards or emails expressing romantic interest in younger colleagues. Some respondents described persistent communications that felt as though the senior colleague was exerting pressure.
- Partners, senior colleagues, and clients sending comments of a sexual nature either via email or text.
- Inappropriate text messages from lawyers in supervisory roles, commenting on the physical appearance of young female lawyers.
- Sexually-charged telephone calls, or instant messages, including from inebriated colleagues.
- Senior colleagues sharing details of marital problems.
- Senior colleagues expressing anger in emails through graphic descriptions.

Respondents' Perspectives on Reporting Behaviors

The respondents provided detailed insights into their reasons for not reporting behaviors to others in the firm. In many instances, the offending behavior came from someone in a position of direct authority or power over the victim. As a respondent in a small firm who felt there was nowhere to turn described:

… As far as I know nothing was said or done because it was the owning attorney who made the comment who was known to be offensive to women and all kinds of different subcultures. It was an employee-at-will office and he was known to dismiss/fire/lay people off on a whim. It was a terrible office to work for.

Many stated that they based their decision not to report on the experiences of others who reported in the past. One respondent best summarized this line of comments:

People who had been subjected to their advances and reported the issues were no longer employed there and these men were. Is there anything more to be said?

Some respondents tolerated frequent advances received via both email and directly because they feared even more negative repercussions from reporting. For example, a lawyer described why she did not report recurrent romantic overtures from a married partner:

I was young and naïve, hoping that it had been a one-time indiscretion on his part and that this was not a pattern of activity. I didn't want to ruin his career and family … but he certainly derailed mine for a period of time.

Another stated:

Would have impacted my review and ability to remain on partner track. Would not have been viewed as a team player.

Similarly, a respondent who was the recipient of vulgar and inappropriate emails noted:

It's my boss, an equity partner, and our HR dept. is useless. It would only jeopardize my job.

Still another did not report suggestive texts and inappropriate touching because of:

Concern for repercussions in ability to get billable work.

Some who did share their concerns with others in a more senior role stated that the behaviors were dismissed as in keeping with the offender's personality. For example, a respondent described the inappropriate texts and uninvited touching she'd experienced from others, including a partner, and noted:

Told multiple supervisors … and was told the comments I was receiving were typical from the individual so don't worry about it. I told one female supervisor when it got to be unbearable and she did report it. I told a male supervisor (of another instance) and it was immediately reported. However, once it was reported, I was told this individual is notoriously inappropriate so … just move on.

A respondent describing sexual comments received from partners similarly stated:

It was firm culture. When discussed, it was dismissed.

Numerous respondents described negative consequences that followed from discussing their concerns internally. For example, a respondent described the retaliation she experienced after reporting emails that denigrated women:

[One of the partners who wrote the emails] retaliated with a false, critical performance review.

A respondent who was the recipient of many unsolicited romantic emails from a senior lawyer stated:

Spoke to female coworker and friend. No follow up actions took place. Eventually I was asked to leave the firm.

In some instances, respondents noted that, although no steps were taken within the firm to officially address the behaviors, they did receive an apology. Another stated that after an attorney inadvertently sent an inappropriate email to the entire firm:

HR followed up within the firm with some mandatory training.

2) Have you ever been the recipient of or witnessed unwelcome physical contact at work?

More than 21% of the respondents to this question stated that they had been the recipient of or witnessed unwelcome physical contact at work. Of these, 36% stated that the incident occurred between 2010 and 2018.

QUESTION 2	Percentage
Yes	21.56%
No	78.44%

Nearly 51% of the respondents to this question were Associates at the time of the incident, 9% were Partners, and the Administrative, Paralegal, and Support Personnel categories exceeded 33%.

Approximately 47% of the respondents who provided information about the size of their firm at the time of the incident were in offices with fewer than 50 lawyers; 40% were in offices of 100 lawyers or greater.

More than two-thirds of those responding to this question stated that they did not report the incident.

Reported	Percentage
No	68.02%
Yes	31.97%

Examples of Behaviors Included in Survey Responses to Question 2

Examples of behaviors described in the responses included:

- Nearly all of the respondents who provided anecdotes reported examples of unwanted and unsolicited hugging, back-rubbing, groping, shoulder rubs, kissing, and lewd comments.
- Numerous respondents described inappropriate groping and other forms of unwanted physical contact during holiday parties and at other social gatherings where there was alcohol.
- Many respondents reported witnessing inappropriate behavior by male colleagues towards younger female associates or staff members.
- Several respondents identified examples of men leering, staring at various parts of a female's anatomy, and standing or walking or "brushing by" inappropriately close.
- Several respondents described incidents early in their career where their boss would proposition them or offer suggestions for ways to dress that would appeal to clients, or otherwise flirt with them.

One respondent, describing numerous examples of "virtually on a daily basis" being propositioned, then bullied when those advances were resisted, stated:

> *It created emotional, financial and professional turmoil in my life which continues … I hope that this survey demonstrates how much even lawyers feel hopeless and incapable of standing up to sexual harassment in a law firm.*

Respondents' Perspectives on Reporting Behaviors

In so many responses to this question, respondents were more likely to stay silent than report offensive or unwanted contact. Most of the respondents who provided anecdotes of unwelcome physical contact focused on the power imbalance as the reason for not reporting concerns about more senior and often powerful colleagues. In particular, they frequently expressed concern about damaging their career opportunities, for example:

> *I was an intern, I wanted a job or good recommendations for future jobs.*

A respondent described a married partner's persistent physical contact when they would be working together. She explained her reason for remaining silent:

> *I was an associate close to partnership. He would vote on my partnership.*

A respondent described inappropriate touching by a colleague and stated her concern about the possible repercussion to her young career:

> *I believed that reporting my male colleague would result in my termination.*

Another respondent who described an incident of inappropriate touching stated:

> *Partner who did this was very popular/made lots of money for the firm and if one of us had to go it would have been me.*

One respondent in a small firm noted:

> *Firm had culture of demanding compliance with inappropriate behavior to "belong," the firm's small size meant that the management committee was overly concerned with protecting partners at all costs ….*

Others observed that no actions had been taken with respect to past allegations, so there was no reason to expect a different result in the future. For example, a respondent stated:

> *Prior complaints about male partner behavior were not heeded. Firm prioritized workplace experience of partners over associates. Size of firm and power dynamic … rendered associates without power and required compliant behavior to keep employment.*

Another respondent who also described multiple incidents of inappropriate contact and comments by both a male partner and a senior associate stated:

> *I spoke to friends and peers. [G]iven the treatment of senior people who committed far more egregious acts, what would be the point in raising the issue?*

Another described incidents of partners trying to date associates and noted:

> *The firm was aware of the behavior already and did nothing. Firms care about rainmaking more than associates.*

A number of respondents informally shared information with lawyers in their firms who were more senior, but were told to treat the remarks or behaviors as a joke. This type of response was recurrent. A respondent who reported unsolicited touching stated:

> *It was treated as a joke and we just had to put up with it.*

A respondent described being inappropriately touched with regularity and stated:

> *Told senior partners and it became a joke. Not taken seriously.*

Similarly, a respondent described a senior partner who frequently engaged in unwelcome physical contact, noting:

> *The senior partner was enormously powerful and popular, and furthermore his conduct was well-known and done in front of other partners and the senior managing partner – and the employment partner – on a regular basis. People who complained about this and other forms of harassment were told they had no sense of humor…. What's the point?*

In other instances, people shared a warning system to alert others:

> *This man's behavior was so well-known that a male partner once asked me to warn a new female … associate about him.*

Another described her efforts to warn:

> *That individual had a reputation for hitting on young women, whether paralegals, summer clerks or associates and I did my best to warn those coming in to the firm to stay clear of him.*

Others shared examples of where efforts to inform others more senior in the firm were unheeded. One respondent noted:

> *I told multiple people including partners. I did not want to make a formal report. No follow up actions took place.*

Another respondent described multiple incidents of unwanted physical contact, stating:

Told head of HR … but asked that it be off the record. Also told male colleagues, venting. Nothing ever happened to my knowledge.

In many of the responses provided, fears of retaliation appeared warranted. Respondents who did report told of circumstances in which they were the target of retaliation. For example, one respondent described her response to a partner's groping and other unwanted physical contact:

I was nervous about mentioning it to HR, so I first told co-workers and some of the younger attorneys. They were … unsure of the repercussions of reporting an equity partner of the firm. [Described process by which another equity partner assisted with follow up.] The situation was handled but some of the long-term attorneys blamed me ….

Respondents described a variety of retaliatory actions, but all had career impacts. Stated one:

Ultimately I was given less and less work after that until I left the firm.

Some respondents told of providing information confidentially to a more senior lawyer, to help others identify patterns in the future, for example:

[I] told a female senior partner, said I didn't want to make a formal complaint but wanted someone to know in case things escalated.

Several respondents noted specific examples where bystander intervention – usually by male colleagues – immediately halted the improper behavior. For example, an attorney who witnessed offensive comments being made by a partner to an associate at a social event where people were drinking stated:

Spoke directly [with the] female associate informing her that I saw the offense as very serious and would address it [with] my partners. Notified [person who handles employment issues within the firm]. Notified all partners. The offending partner was spoken to. No direct punishment but I think damage to his reputation.

In another instance where a male was inappropriately touching and making suggestive comments to female law clerks, bystander intervention helped when male coworkers collectively told the offending lawyer his behavior was unacceptable.

Several noted that they cut off contact with the individual involved by moving to a different location in the firm or changing practice groups.

3) Have you ever felt that someone was trying to engage you in unwelcome discussions (including through comments or actions) of a sexual nature?

More than 25% of the respondents to this question stated they felt someone had tried to engage them in unwelcome discussions of a sexual nature. Of these, approximately 35% stated that the incident occurred between 2010 and 2018.

QUESTION 3	Percentage
Yes	25.38%
No	74.62%

Of those who responded to this question, nearly 70% were Associates at the time of the incident, slightly more than 6% were Partners, and the Administrative, Paralegal, and Support Personnel categories comprised 21%.

Nearly 56% of the respondents who provided information about the size of their firm at the time of the incident were in offices with fewer than 50 lawyers, 21% were in offices with between 50 and 99 lawyers, and 23% were in offices of 100 lawyers or more.

Nearly 75% of those who responded to this question did not report the behavior.

Reported	Percentage
No	73.91%
Yes	26.08%

Examples of Behaviors Included in Survey Responses to Question 3

Examples of behaviors described in the responses included:

- Male lawyers demeaning young women in front of male colleagues or clients through sexual references.
- Discussions of extra-marital affairs, sexual escapades, or sexual fantasies.
- Senior male colleagues moving conversations from the professional to personal issues.
- Frequent vulgar or sexualized jokes and remarks that objectify women.
- Prying into the personal and sex lives of women in the firm.
- Direct sexualized and objectifying comments to women about their physical appearance or the physical appearance of others.
- Sexualized comments, innuendos, or propositions made at or after firm social events at which alcohol was served.
- Leering and comments directed at summer associates by partners and senior associates.
- Inappropriate comments, unsolicited touching, and prying questions to LGBT lawyers, prying into their sexual life.

Respondents' Perspectives on Reporting Behaviors

Many respondents expressed an unwillingness to report these behaviors. Reasons centered on the lack of a clear avenue for reporting, the involvement of senior leaders in the behaviors, and concerns about negative repercussions. For example, one respondent observed:

> *I didn't have a supervisor. There was no person or process for reporting. [I]f I had tried to make an issue of it I would have lost my job.*

A respondent who did not report a partner's highly sexualized comments noted:

> *It's my boss, an equity partner, and our HR is useless. It would only negatively impact my job.*

Another respondent discussing a culture of vulgar or sexualized jokes stated:

> *I was a young associate in a virtually all-male department and afraid I would be perceived as not "fitting in."*

Similarly, a respondent observed:

> *It was expected and accepted behavior by other partners and staff.*

Long-term career impacts loomed large in the calculation many respondents made in deciding whether they had any place to turn within the firm. A respondent who was the recipient of frequent lewd comments and behaviors stated:

> *Fear of retribution, fear of rocking the boat as a brand new attorney with no status in the firm yet, desire to be seen as a "chill", non-dramatic team member.... My career was directly in these partners hands, since even first year associates were beholden to partners for feeding them work in a vassal/feudal sort of structure the firm insisted on maintaining.*

Another respondent who endured frequent comments about her body and sexual innuendos noted she did nothing because the behaviors were:

> *Part of the ... culture; the comments came from senior partners; and there was no one to report to whom I considered to be sympathetic to the issues. Also, fear of retaliation.*

A respondent described explicit overtures that were made and stated:

> *The transgressor was the managing partner and there was no one else to go to.*

Many respondents described sharing their stories with others, but not reporting to anyone with authority within the firm. A respondent who was the frequent recipient

of improper comments explained why she spoke only to friends and peers:

> *No sense in reporting. These individuals had had indiscretions and improper conduct with subordinates that had been reported and known and they were still with the employer and the women were not.*

Some respondents noted that they shared information with a woman partner, for example:

> *I reported [the behaviors] to a female partner. No follow up.*

A respondent who did not report an uncomfortable proposition from a married partner while she was an intern also revealed how continued silence fuels ongoing inappropriate behaviors:

> *Later on, I did [speak] with a female partner and I did tell her, and she said she was not surprised to hear the story.*

A respondent who did not report a partner's frequent sexualized comments and demeaning remarks noted a satisfactory result when the behavior was finally reported:

> *At the time, I just ignored it. Eventually someone else reported it and this person was asked to leave the firm due to other inappropriate behavior.*

Several respondents reported that they handled the situations by confronting the offending lawyer directly, sometimes with positive results:

> *I dealt with it myself. I also think the person who engaged in the conduct would not do it again to me or anyone else at work.*

Similarly, another respondent reported a successful result when direct action was finally taken:

> *It finally stopped when I confronted the people involved about it and explained why I thought their actions were a problem. It took me a couple of years to do that.*

4) Have you ever witnessed materials or items of a sexual or disparaging nature, including sexual images, displayed in your workplace?

Slightly more than 10% of those who responded to this question stated that they had witnessed materials or items of a sexual or disparaging nature displayed in the workplace. Of these, 36% stated that the incident occurred between 2010 and 2018.

QUESTION 4	Percentage
Yes	10.22%
No	89.78%

Nearly 54% of those responding were Associates at the time of the incident, almost 17% were Partners, and the combined categories of Administrative, Paralegal, and Support Personnel comprised approximately 22%.

Approximately 75% of the respondents who provided information about the size of their firm at the time of the incident were in offices of fewer than 50 lawyers.

More than 72% of those responding did not report the incident.

Reported	Percentage
No	72.83%
Yes	27.16%

Examples of Behaviors Included in Survey Responses to Question 4

Examples of behaviors described in the responses included:

- Content displayed on a computer, including inappropriate screen-saver images as well as watching porn.
- Sexual posters or other images in rest rooms and office areas.
- Attorneys sending or sharing pornographic emails or images.

Respondents' Perspectives on Reporting Behaviors

Respondents generally did not report these behaviors, stating that, in most instances, it was already known

and, in other instances, they did not want to risk retaliation. For example, one respondent said:

> *[P]erhaps cowardice; but more likely a strong desire to remain employed and meaningfully engaged within my practice, without imaginable retaliation.*

Another described her reluctance to report attorneys who shared sexual images:

> *I feared that I would be ostracized/retaliated against.*

Several respondents stated that their supervisors were involved in the offending conduct, rendering reporting futile. Others stated that they just ignored the images or put it out of their mind.

Some respondents reported instances of pornography with mixed results. One respondent noted that inappropriate graphic imagery was reported to two partners, including the Managing Partner:

> *I expected that the individual who was engaged in the action I reported would be spoken to but I learned that did not take place.*

One respondent took an effective route by reporting pornography on another lawyer's computer to the IT department:

> *Notified our IT department and personnel to make sure the computer was purged and blocked.*

A respondent who did not report a co-worker's excessive watching of porn stated that, after the behavior was reported by someone else, the individual was terminated.

5) *Have you ever witnessed any incidents of disparagement of other people or groups in the workplace that made you feel uncomfortable?*

More than a third of those responding to this question stated that they had witnessed incidents of disparagement of others at work in a way that made them feel uncomfortable. Of these, more than 50% stated that the incident occurred between 2010 and 2018.

QUESTION 5	Percentage
Yes	35.31%
No	64.69%

Approximately 69% of those responding to this question were Associates, 10% were Partners, and the combined categories of Administrative, Paralegals, and Support Personnel comprised more than 17%.

More than 60% of the respondents were in offices of fewer than 50 lawyers and nearly 25% were in offices of 100 lawyers or more.

Nearly 75% did not report the incident to a co-worker or supervisor.

Reported	Percentage
No	74.24%
Yes	25.75%

Examples of Behaviors Included in Survey Responses to Question 5

Examples of behaviors described in the responses included:

- Slurs and demeaning comments about race, gender, religion, and sexual orientation.
- Disparaging or inappropriate comments about pregnancy, maternity leaves, or status as a mother.
- Negative behaviors towards minorities, women, and older workers.
- Women partners dismissive of experiences of younger female lawyers with respect to work-life choices.
- Anti-immigrant comments.
- Ageist comments.

One respondent commented on her three decades in the profession, including multiple workplaces:

Many, many, many, many, many (seems like countless) derogatory remarks about people of color, people of different ethnicity, gay bashing, transgender bashing from all levels (clients, coworkers, management) in every single position, every single firm I have held/worked for throughout my 30 year career. I wish I could say I was exaggerating but, alas, I am not.... Believe me when I say all kinds of 'isms in Massachusetts are alive, well and thriving throughout all different kinds of law firms, throughout all different levels.

Respondents' Perspectives on Reporting Behaviors

Respondents who did not report disparaging comments that they witnessed or that were made directly to them offered reasons similar to the responses in prior questions for remaining silent: no expectation that anything would be done; the engagement of senior leadership in the behaviors; and the belief that, by reporting, the respondent would be labeled as humorless.

One respondent described the frustration of seeing behaviors continue unchecked across the span of the respondent's career, which included multiple law firms:

Many comments were made by management which does not encourage one to report anything. The comments that were made by co-workers I tried to address myself to no avail. The few times I have mentioned things to management they were swept under the rug as a non-issue. When this happens more times than not, you just stop reporting the micro-aggressions and learn how to live/deal with it to the best of your ability.

Many respondents noted the power imbalance that enabled lawyers to act with impunity. One such respondent noted:

He was one of the controlling rainmakers in the firm. No one said no to him or could control him.

Another respondent commented on the power imbalance that prevented a response to a culture of "demeaning racial/ethnic jokes":

I was a young associate in a predominately male department afraid of being perceived as not fitting in.

A respondent who did not report what she saw as anti-immigrant and misogynistic comments observed:

They mostly knew and did nothing about it, so the expectation was that even if they were told of something new they would still not do anything about it.

Another respondent described a culture of "innumerable sexist, homophobic, racist, anti-Semitic comments," noting:

[I] did not feel empowered to do so as associate who needed job to pay student loans and support young family etc.

One respondent did not report frequent observations of disparaging treatment of support staff by partners:

Because I had no power. Instead, I looked for a new job.

An LGBT attorney described a culture of frequent disparaging jokes against multiple targets and that such comments were " … never aggressively offensive, but deniable in the just-joking-around context." The respondent stated why reporting did not feel like an option:

Culturally accepted in the firm. Had no faith in ability to change the culture.

A young lawyer who did not report shared the pain experienced from hearing disparaging comments about immigrants:

I was a diverse scholarship winner at the time and I didn't know how to even begin to explain how hurtful it was to hear people in the firm make jokes about immigrants and other minorities. I had higher expectations for the firm ….

Respondents frequently described a culture where the comments were expected to be viewed as humorous. As one respondent stated:

There was no point – such remarks and commentary were routinely tolerated and brushed aside as "jokes". Reporting would only jeopardize my position. I would be viewed as someone who "can't take a joke". Reporting would not have brought about a positive change.

Another, describing ongoing crude commentary, noted that a:

… toxic culture of inappropriate behavior was tolerated and laughed off. There was a feeling that there was no point in reporting.

Numerous respondents stated that there was no one to report to, as those in charge were part of the problem, for example:

The comments were made by or to the person to whom I would have reported.

Similarly, another noted:

Everyone I would report the conduct to is always in the room when it happens.

A few respondents gave examples of an HR structure that declined to get involved. For example, one respondent who reached out to HR with concerns about discriminatory behaviors against women stated:

I informed the HR manager, who said the Partners were "out of touch" and told me to ignore them.

Another stated:

HR was present when senior partner made disparaging comments and did nothing.

In some cases, reports of disparaging comments were made, but no follow up feedback was provided. For example, a respondent described a senior attorney's disparaging treatment of support staff and noted:

I informed the managing partner. To my knowledge, no steps were taken to resolve the issue.

In other instances, respondents who tried to report were told to figure out how to avoid the individual or improve the relationship. For example, one respondent described her effort to report a female partner's disparagement of her pregnancy and status as a mother (a situation described by several respondents):

I told an equity partner.… He told me that if I wanted to become a partner, I had to get this female partner to like me more.

Some stated they tried to shut down the conversation when offensive stereotyped comments were made, as this respondent indicated:

Most of the time, I just told them to stop.

A partner in a leadership role described responding to a lawyer who openly expressed bigoted views:

I … immediately addressed this issue with the person and it never happened again and nobody ever told me that they had heard any derogatory remarks or discriminatory remarks from him after this.

A few respondents described a reporting process that worked. One respondent noted:

In fact, we have reporting systems in place at my current office. I know of incidents witnessed by co-workers that have been reported and are being addressed by HR/management.

One respondent described the eventual termination of an equity partner who continued to make disparaging comments, notwithstanding after efforts to coach and monitor his behavior:

I told our local managing partner and the firm's managing partner.… After attempting coaching, sensitivity training, and months of supervising his behavior,

the firm eventually fired him.

A respondent described responses to several incidents of disparaging comments and behavior, including at a social event and another in the office:

As to the misbehavior [at the social event], it was widely reported, and the firm disciplined the partners involved and held trainings throughout the firm. As to the other one, the … department investigated and reprimanded the person.

6) *Have you been present when comments or jokes were made that were sexual in nature or disparaging of other people or groups?*

This question garnered the highest percentage of affirmative responses, with 40% of those responding to this question stating that they had been present when comments or jokes were made that were sexual in nature or disparaging of other people or groups. Of these, approximately 40% stated that the incident occurred between 2010 and 2018.

QUESTION 6	Percentage
Yes	40.23%
No	59.77%

More than 65% of those who responded to this question were Associates at the time of the incident, 11% were Partners, and the combined categories of Administrative, Paralegal, and Support Personnel comprised 21%.

Approximately 58% of those responding to this question were working in offices of fewer than 50 lawyers and approximately 28% were in offices with 100 lawyers or more.

Nearly 87% stated that they did not report the information to a co-worker or someone in a supervisory role, the question with the highest percentage of non-reporting respondents in the survey.

Reported	Percentage
No	86.66%
Yes	13.33%

Examples of Behaviors Included in Survey Responses to Question 6

Examples of behaviors described in the responses included:

- Frequent gender-based jokes and efforts at humorous commentary focusing on women's bodies, specifically relating to breasts, sexuality, weight, and maternal status.
- Frequent jokes and commentary by men referencing their sexual fantasies or joking about sexual exploits.
- Frequent jokes that involve race, religion, sexual orientation, and gender.
- Inappropriate jokes told at events where alcohol was served; sometimes the jokes were told publicly, as part of a lawyer's official remarks, and sometimes privately within social groups.

Respondents' Perspectives on Reporting Behaviors

Many respondents to this question described off-color or disparaging humor as "pervasive" or "too many incidents to describe." Most did not report the incidents. Consistent with the reasons provided in other questions, many felt fearful of retaliation or that there was no one to report to, particularly because of the status of the offending individual. In many instances, these types of remarks felt like part of the firm culture.

Several respondents described the conflict between the danger of appearing humorless compared to the sense of being worn down by the continued stream of insulting remarks. A respondent commented on her reaction to frequent disparaging jokes about women:

This kind of commentary was tolerated and accepted as part of the culture. Reporting would not bring about a change and would only negatively impact my career. Additionally, a single comment can easily be brushed aside as a joke – one almost feels silly/ doesn't want to be viewed as being too serious about any one offhand comment.

Similarly, a respondent observed:

It seemed like it was expected and "normal," and I

was too junior to complain.

Another noted that jokes about females were "pervasive":

People in highest positions do it. It's a "joke."

Again, the status of the individuals making the comments seemed to serve as an inoculation against a negative response, for example:

Such behavior and statements are typical of this senior partner, and after repeated instances of such, there is an understanding that there are no repercussions for this person, so there is no reason or person to report this to.

Another respondent stated why she did not report graphic joking from a partner:

The firm had a history of ousting women who reported issues. He was a practice group co-leader at the point. We were junior associates. We preferred to stay employed.

A respondent further highlighted this point:

I reported this to a female partner. She agreed this was despicable but nothing was ever done because the partner who made the comments was a big rainmaker.

One respondent observed how the power imbalance can shift over time, depending on one's status within the firm:

On most occasions, I was in a position to tell them to stop. When I wasn't a partner, I felt my job would be in jeopardy.

Several respondents described sexually charged jokes at firm social events. One noted:

Those were the guys in power. No good would have come from reporting these incidents. I would have been ostracized.

In a few instances, respondents spoke of off-color jokes as "locker room talk" or "banter" that was not harmful, so they did not feel a need to report the remarks.

One respondent highlighted senior partner support that stands as an example of a useful intervention. Describing graphic stories being told to a group during a break in a meeting, the senior partner left the room with the associate and further made it clear that the associate should never feel pressured to remain in such a situation.

In another positive example, a respondent described disparaging jokes made by a more senior lawyer and then noted the follow up:

I spoke with a[n] … attorney, who brought me to a very senior female attorney.… She talked with me about options for what could be done, and let me choose. She did what I asked (which was for her to speak with this guy). She spoke with him, and he apologized (it seemed sincere).

A respondent who very directly "let offenders know this was verboten" noted her valid reason for doing so without worry about retribution:

I am the boss.

7) Have you ever been asked personal questions or questions of a sexual nature that made you feel uncomfortable?

Nearly 16% of those responding to this question noted that they had been asked personal questions or questions of a sexual nature that made them uncomfortable. Of these, approximately 41% stated that the incident occurred between 2010 and 2018.

QUESTION 7	Percentage
Yes	15.80%
No	84.20%

Sixty-seven percent of those who responded affirmatively were Associates at the time of the incident and less than 5% were Partners. The combined categories of Administrative, Paralegal, and Support Personnel exceeded 22%.

Nearly two-thirds of the respondents were in offices of fewer than 50 lawyers; more than 28% reported being in offices of 100 lawyers or more.

More than 78% said they did not report the incidents to a co-worker or supervisor.

Reported	Percentage
No	78.57%
Yes	21.42%

Examples of Behaviors Included in Survey Responses to Question 7

Examples of behaviors described in the responses included:

- Male lawyers asking pregnant women detailed questions about their physical condition, including questions about their breasts.
- New mothers being asked detailed questions about breastfeeding.
- Women asked questions about their age and their personal life such as whether they were married or engaged, and when they planned to have children.
- Men commenting on specific physical aspects of a woman (as distinct from a generic compliment).
- People being asked about their sexual orientation.
- People being asked questions about their sexual relationships.
- Clients asking questions of a sexual nature.

Respondents' Perspectives on Reporting Behaviors

Fear of retribution and concern about one's internal reputation again emerged as primary reasons for not reporting. Both of these concerns were highlighted in a respondent's explanation of why she did not report a male lawyer's prying comments:

> *This person was notorious for his treatment of females – it was already known from the top down. Reporting would not have made a difference. Also you worry what reporting would do to your own career. It wasn't worth the risk.*

A number of respondents stated that they did not report because they feared a diminished reputation in the firm. For example, a respondent who was asked highly inappropriate questions on multiple occasions noted:

> *[The concerns were] uncomfortable to talk about, not the only one who has experienced this and nothing is done about it. If something was done it would likely hurt my professional relationship with the attorney(s) involved as well as others at the firm.*

Similarly, another respondent who described her personal discomfort with sexualized questions stated:

> *Who wants to be known as the person who complained about something, rather than known for my skills?*

In many of the examples provided, and similar to the responses in other questions, respondents stated that they did not report the behaviors because the person to whom they would report was the person making the comments, for example:

> *The supervisor was the perpetrator. [I]t was either my career or report the comment(s). I was not going to let his actions hinder my career.*

Another respondent who described uncomfortable comments made to her about her sexual orientation succinctly stated why she did not report:

> *He was one of the managing attorneys.*

A respondent who described being asked inappropriate personal questions noted:

> *Perpetrator protected by management.*

Other respondents offered similar reasons:

> *The comments/questions came from the managing*

partner.

Some respondents indicated they found solace by commiserating with others in the firm. For example, a respondent stated that female associates who found themselves the object of inappropriate questions and prying by another lawyer formed their own support network:

We both decided to be a support system for each other, and we discussed ways to avoid being alone with that attorney.

Respondents also described informally sharing information with those more senior. One respondent gave examples of behaviors from someone she described as known to be a "serial harasser" and noted:

I reported him several times to a female partner.

In a number of instances, respondents were the recipient of inappropriate questions and comments from clients. In those examples, the respondents generally spoke with a more senior person in the firm but often specifically asked that nothing further be done.

8) Have you ever been made to feel that you needed to engage in sexual behavior or develop a personal relationship with someone at work to advance?

This question had the smallest number of respondents. Of those who did respond, more than 28% answered affirmatively. Of these, nearly 35% stated that the incident occurred between 2010 and 2018.

QUESTION 8	Percentage
Yes	28.57%
No	71.43%

Approximately 60% of those who responded to this question were Associates at the time of the incident, 8% were Partners, and the combined categories of Administrative, Paralegal, and Support Personnel comprised 16%.

More than 56% were in offices of fewer than 50 lawyers; approximately 30% worked in offices of 100 lawyers or more.

For this question, the percentage of those who reported the behavior was higher than the other questions (although the number of respondents overall was much smaller): more than 57% reported the behavior to someone else.

Reported	Percentage
No	42.86%
Yes	57.14%

Examples of Behaviors Included in Survey Responses to Question 8

Examples of behaviors described in the responses included:

- Lawyers describing sexualized behaviors and implying that such behaviors can help career advancement.
- Proposing to have "mentoring conversations" in a non-professional atmosphere such as a bar or hotel.
- Inappropriate advances towards summer associates.

Respondents' Perspectives on Reporting Behaviors

Respondents who provided information for this question generally did not feel they had any place to turn. Most simply expressed their frustration, for example:

It was clear that the only way to assure a good salary and a promotion was to sleep with the boss. He had the power and he made the decisions. The … only action we could take was to leave.

Another, observing that firm partners revealed clear preferences for how they expected females to behave, noted:

I was unwilling to flirt or act like this, and felt I was ignored and even berated by certain male partners. The offending male partners were too powerful…. Plus, I don't even think they were consciously aware of their bias.

Some respondents said they felt unable to advance because they refused to be part of a culture where success seemed linked to social expectations. One respondent described how social interactions served as a gatekeeper to success:

> *Advancement within the firm/access to more sophisticated work was largely driven by personal relationships.... Despite ... disparaging comments about the quality of a colleague's work, such colleague was given more opportunities because he played the game of drinking/going out/wing-manning with/for the young-ish partners.*

Another respondent described how reporting uncomfortable and inappropriate experiences as a summer associate backfired:

> *Reported it to [the] male ... in charge of summer associate program and some hiring. It ended up becoming a mess because I was pressured to let him tell partners and ultimately the person who I reported found out I had done so and basically it made the work environment hostile.*

9) Have you ever felt you were the recipient of or have witnessed bullying behavior in the workplace?

Nearly 40% of those responding to this question stated that they had been the recipient of or had witnessed bullying behavior in the workplace. Of these, approximately 44% stated that the incident occurred between 2010 and 2018.

QUESTION 9	Percentage
Yes	39.45%
No	60.55%

More than 69% of those who responded affirmatively to this question were Associates at the time of the incident, nearly 10% were Partners, and the categories of Administrative, Paralegal, and Support Personnel comprised nearly 16%.

Approximately 56% were in offices of fewer than 50 lawyers; nearly 27% were in offices with 100 lawyers or greater.

As with all questions, the majority of the respondents did not report the behaviors, although the percentage of those who did not report the behaviors was less than in most other questions.

Reported	Percentage
No	54.05%
Yes	45.94%

Examples of Behaviors Included in Survey Responses to Question 9

Examples of behaviors described in the responses included:

- Partners screaming at or otherwise humiliating others (at all levels) in the firm.
- Bullying that escalated to physical abuse or throwing of objects.
- Feigning deadlines or other hazing behaviors.
- Feeling punished by more senior women.

Respondents' Perspectives on Reporting Behaviors

Respondents described a range of behaviors, including those that induced physical stress reactions in both the victims of bullying and the witnesses – who reasonably may have been fearful as to whether they were next. One respondent described negative physical consequences experienced by others in the firm, then explained why no action was taken:

> *[S]enior partner and head of the ... department would routinely humiliate anyone who crossed him.... This would include his fellow partners as well as outside counsel. For example ... he would make ... snide personal comments ... about [people's] height, weight, or looks. In general, he did this when he was about to be challenged on an issue.... This was a senior partner and decision maker. Raising the issue would just result in more humiliation.*

Another described bullying tactics she endured and offered similar reasons for not reporting:

> *My boss was a jerk, unnecessarily. His teaching style was to make me feel like I had done something egregiously wrong when it was a minor issue. He seemed*

purposefully to start a discussion by suggesting I had really screwed up when I hadn't. Every time I saw a note from him to see him, or I got a call from him, I would get very nervous. It was very stressful.… I did not report it for several reasons. First, he was the managing partner. Second, everyone knew that was just the way this partner operated. Indeed, it tends to be a revolving door of associates who work with this partner …

Many respondents who specifically described bullying of associates that took place also reinforced, similar to responses in other questions, that the apparent common knowledge of the perpetrators' behaviors rendered reporting not an option, for example:

Some senior partners and associates would use demeaning language and actions directed at younger associates as part of their management style. It was common knowledge at the firm.

Similarly, some respondents described extreme behaviors that went beyond verbal abuse and explained that the behaviors were not reported because the perpetrators were powerful partners:

Certain partners, mostly male, were extremely bullying and nasty to the staff and associates. [More than one] of them threw objects around the office. [Anecdote described an incident where someone was physically targeted.] No need to report it. Other partners were aware but powerless to reign in the powerful male partners, who also happened to be rainmakers.

A number of respondents gave examples of escalating behaviors, with a similar reason for not reporting:

Partners regularly bullied associates by calling them out publicly on assignments, yelling and screaming at them, throwing files, dumping files, and if the partners knew associates had vacation coming, assigning new and/or additional cases so that the associate could not go on his or her trip. This was to ensure that associates knew who was in charge. This was the firm culture. It was well known that it would get worse if you started to complain to HR about it.

Another respondent noted an atmosphere of intimidation with no recourse because of the status of the perpetrator:

Files … being thrown across room, staff being yelled at, staff members being pitted against one another, staff being belittled …

Similarly, a respondent described intimidating behaviors that also included the throwing of objects:

Objects thrown around office. Screaming. Yelling. Slamming doors. Verbal threats.

In many cases, the respondents highlighted behaviors that they said felt more like hazing than being part of a legal team. In such circumstances, the general view was that there was no point in reporting. One respondent typified many of the comments:

Insecure men bully to make themselves feel better. For example making associates pull all nighters in the office to haze them, knowing it was not necessary to meet client needs. Yelling. Screaming. Culture was to toughen up and take whatever a partner dishes out. Partner is always right.

Another respondent observed the hazing aspect with no opportunity for redress:

Senior partners frequently bullied associates as an intimidation and motivation technique – this was part of one's initiation in the world of large law firms. The persons conducting the bullying were senior members of the firm. They were the supervisors and everyone was aware this type of conduct was expected.

Similarly, a respondent noted:

Requests aren't made in civil tones, but in harsh tones, coupled with negative comments re: quality of associate's work or associate's commitment –

especially if associate has family obligations. Felt like putting up with this conduct was a job requirement.

A few respondents described bullying behaviors from women, for example:

Women constantly knocked women.... The women in power did not have children, and seemed to not be able to relate to me or like me. I was a threat and was punished. What was the point – I needed to advance.

Another respondent similarly described bullying by female partners and the failure of the firm to follow up after reporting the behaviors:

My two supervisors, both of whom were women, were horrible bullies. One in particular never took personal responsibility for anything and always laid blame at the feet of others. It was truly a toxic environment. I told HR ... , the CFO ... , and the managing partner.... The entire firm was aware of the behavior, which was a pattern, and ... no one has done anything about it because [they] bring in money.... The firm simply does not care.

On the other hand, many respondents described women as receiving the brunt of verbally abusive tactics, yet few saw any hope for change. Noted one respondent:

Bullying and intimidation of women when older men felt threatened by their greater competence and social abilities. Fear of reprisal and negative impact on career [are reasons for not reporting].

One respondent described the negative results following efforts to intervene:

I worked with a senior partner who bullied everyone around him.... He would make derogatory remarks as a matter of course to everyone. Because he was the principal rainmaker at the firm. When I did finally cross this individual in an attempt to protect a more junior attorney, I ultimately lost his good opinion, and left the firm.

Several respondents who described an abusive culture noted that efforts to report proved futile, for example:

Been through countless meetings and encounters – senior partner(s) scream and yell and throw things because they are unable to properly express their frustrations. This is the hardest part of my work environment. I have developed a fear response, which is ridiculous. [Reporting has usually been done to] HR or close male colleagues. Nothing is ever done.

In another example, a respondent described the lack of follow through after behavior was reported:

At my firm, I am aware of two partners who have bullied subordinate attorneys and staff. In relation to the local partner ... who engaged in bullying, I talked with the Partner in charge of our office ... and the Practice group leader.... Further management training for the offending partner was discussed, but has not yet been implemented.

One respondent noted that an internal process may have been triggered, yet no specific information about follow up was available:

I witnessed numerous incidents of male partners screaming at and bullying younger associates – mostly female but some male. It was already under investigation.

Based on some of the comments, it appeared that there was greater follow up when an associate engaged in wrongful behavior, rather than a partner. One respondent described being frequently bullied by an associate and how it was ultimately handled:

I spoke with [particular person within the firm who raised the issue] and it was nipped in the bud. They spoke with him and it was done in an appropriate way and the behavior changed.

A respondent provided an example of a firm taking action against a partner when it learned of the extent of that partner's behaviors, including physical intimida-

tion and sexual harassment of female associates. The respondent spoke with the managing partner and other partners, and subsequently the offending partner was forced out of the firm.

Other respondents also provided positive examples of reporting that led to a satisfactory result. For example, one respondent told another lawyer of a partner's verbally abusive behavior and later received a phone call in which the partner apologized.

In another instance, a respondent described an atmosphere of rudeness and disrespect by the managing partners. When a female partner addressed this directly, one of the managing partners called the respondent to apologize, and his behavior improved.

Another respondent reported on a successful self-help measure:

> *I was berated and yelled at by senior attorneys for reasons that had nothing to do with my work.... The whole experience was absolutely horrible. I have since changed jobs and currently work for an absolutely incredible, very supportive firm where I truly feel that I have the tools that I need to succeed.*

10) Have you ever felt threatened, embarrassed or humiliated, or witnessed someone being threatened, embarrassed or humiliated, by someone in the workplace?

Nearly a third of those who responded to this question reported feeling, or witnessed someone being, threatened, embarrassed, or humiliated by someone in the workplace. Of these, 44% stated that the incident occurred between 2010 and 2018.

QUESTION 10	Percentage
Yes	31.69%
No	68.31%

Nearly three-quarters of those responding were Associates at the time of the incident, approximately 12% were Partners, and the combined categories of Administrative, Paralegal, and Support Staff comprised nearly 15%.

Approximately half of the respondents worked in offices of fewer than 50 lawyers and nearly 40% were in offices of 100 lawyers or more.

Sixty percent of those responding affirmatively to this question did not report the behaviors.

Reported	Percentage
No	60.18%
Yes	39.81%

Examples of Behaviors Included in Survey Responses to Question 10

Examples of behaviors described in the responses included:

- Partners expressing anger by openly berating lawyers, yelling in public, or otherwise demeaning a younger colleague.
- Being directly asked to engage in sexual activity.
- Criticisms and insults designed to diminish the confidence of associates.
- Criticizing people in public for personal behaviors relating to what they eat, whether they exercise, their weight, etc.
- Sexualized behaviors and comments.
- Demeaning the skills of female lawyers by saying they were only being included (e.g. in a meeting, or assigned to a particular matter) because of their looks or because they needed to add a woman to the team.

Respondents' Perspectives on Reporting Behaviors

Many of the anecdotes described in response to question 10 were similar to the types of behaviors reported in question 9. Respondents described situations in which they felt intimidated and humiliated, with no recourse available.

A few respondents who were more senior in their career described earlier experiences where they endured humiliating behaviors from other lawyers. For example, one stated:

> *I have found in my career many lawyers with large egos who have taken upon themselves to humiliate me and others in order to make them feel large. There has been so many incidents that it would take a volume of pages to write them all. If you had reported any humiliating incidents, especially when it was in response to lawyers, you were seen as a trouble maker and run the risk of a bad annual review and possible termination.*

Some respondents described behaviors that combined humiliation and actual physical assault:

> *One … partner would swear, berate and humiliate associates in public areas…. He also threw … desk items at associates. The incidents didn't happen to me, and it was already common knowledge to management.*

A respondent who witnessed partners screaming at and insulting more junior lawyers did not see reporting as a productive option:

> *Did not want to hurt partner's reputation or damage my professional relationship with the partner or other professionals at the firm.*

Another respondent noted a lawyer's humiliating tactics that were not reported:

> *A senior associate consistently humiliated me in front of co-workers and opposing counsel. I did not report it because I did not believe it would change the senior associate's behavior. I also thought that it would have negative consequences on my career.*

As noted in responses to other questions, being a rainmaker served to inoculate many partners from being held accountable. One respondent, describing a senior partner who frequently yelled at and belittled others in the firm, stated why the behaviors were not reported:

> *Because everyone tolerated him because his book of business was really big and he was a good … lawyer.*

Another respondent stated:

> *As a rule, many of the attorneys I worked for or with did not have good leadership or training skills and would make associates or others miserable while trying to train them. Just accepted that was the way it was.*

Some respondents described senior partners who seemed to use the humiliation of others as a tactic, observing that even where managing partners spoke to the offending lawyers, nothing changed.

Several female respondents noted incidents of sexualized behaviors. One respondent described having to continually ignore a partner's "intense" behaviors:

> *Partner was basically a good person who looked at my chest, not my eyes, a little too often.*

In another example of a male partner treating women in a demeaning way, the respondent described reaching out to a member of the large firm's leadership and its HR Department. The firm leader dismissed the concerns and the HR Department did not follow up.

Humiliating behaviors sometimes took the form of publicly undermining the skills or capabilities of another attorney. For a number of female survey respondents, this happened when they were told that they were only being included in a meeting or assigned to a case because of their looks or because they needed a woman on the team. In one example, such a statement was overheard by a male partner who then reported the incident to the managing partner. The firm followed up with a clear reprimand that included the actions that would be taken if such an incident happened again.

Not all of the offending behaviors came from men. Some respondents described incidents where women partners humiliated others in the firm. In one such incident, the recipient of the berating behaviors was assigned to other partners; in another instance, efforts to speak to the partner failed to result in changed behaviors. Another respondent reported a successful resolution to a female partner's efforts to humiliate others:

> *I had a supervising attorney who would humiliate the other female attorneys; in retrospect she saw other females as threats. I confronted her about it, and she stopped.*

It is interesting to note that a few respondents challenged the notion that there might be something wrong with using humiliation as a tactic to address someone's mistakes. For example, one respondent stated:

> *It is not uncommon to be humiliated in the practice of law when things go wrong, and you have made a mistake on the part of a client. We should be humiliated when we screw up.*

Another observed:

> *Isn't the culture of a law firm to be highly critical and demanding? It's the culture – sink or swim.*

A few others seemed resigned to the idea that being a lawyer meant being part of a harsh culture. One respondent stated:

> *One of the senior partners would yell at me and at others as part of his "management style." It was not necessary to report it because it was widely witnessed and experienced by many people in the firm.*

11) Has anyone ever spoken with you about their concerns regarding workplace behavior that made them feel uncomfortable?

Of those who responded to this question, nearly a third said others had spoken to them about workplace behaviors that made them feel uncomfortable. Of these, approximately 62% stated that these conversations occurred between 2010 and 2018.

QUESTION 11	Percentage
Yes	31.37%
No	68.63%

As with most other questions, the highest percentage of the respondents were Associates (approximately 44%). It is interesting to note that 20% of the Partners responded affirmatively – more than in any other question. This suggests that people in the workplace who share their stories may be seeking support from more senior level individuals.

Nearly 38% of the respondents who provided information about the size of their firm at the time of the incident were in firms of fewer than 50 lawyers. Approximately half were in firms of 100 lawyers or more, somewhat higher than the percentage reported in response to other questions.

Among those responding to this question, the percentage of respondents who reported was similar to the percentage of respondents who did not.

Reported	Percentage
No	50.44%
Yes	49.56%

Examples of Behaviors Included in Survey Responses to Question 11

Examples of behaviors described in the responses included:

- Colleagues sharing examples of being sexually harassed, sexually assaulted, or propositioned by partners in the firm (including incidents involving partners and summer associates).
- Colleagues sharing examples of experiencing homophobia.
- Colleagues sharing negative comments made about women becoming pregnant and having children.
- Colleagues sharing stories among each other about which partners to avoid.
- Summer associates sharing examples of inappropriate behaviors they experienced.

Respondents' Perspectives on Reporting Behaviors

Generally, respondents stated that they did not further report information shared by colleagues. For example, a respondent noted that a colleague had been the frequent target of sexual harassment by a partner, but the respondent did not report the behavior:

> *I feared being retaliated against, and I thought the colleague would also be retaliated against.*

A respondent stated that female colleagues shared their discomfort with having to thwart explicit advances from senior colleagues, then noted why the respondent did not further report these incidents:

> *It was not my story to tell.*

Several stated that anecdotes were shared in confidence. For example, a respondent honored the request of a colleague to not report that person's uncomfortable experiences with homophobic comments in the workplace:

> *My colleague asked me not to report it for personal reasons.*

The sharing of information among colleagues, in many instances, seemed to be part of the workaround, as this response exemplified:

> *Associates talked among ourselves; "whisper network" regarding specific partners to avoid or be careful around. Was culture of large law firm life.*

Another reported:

> *Associates would talk amongst themselves about which partners were the ones that were desirable to work for and which ones you wanted to avoid working for because of the poor treatment you would receive. It was known behavior in the firm from everyone else that had advanced through the partnership.*

A respondent commented on the many stories shared by colleagues about their uncomfortable situations:

> *I mainly played a listening role as my colleagues just wanted someone to talk to because they feared retaliation if they reported anything.*

When attorneys exhibited patterns of negative behavior, it frequently became common knowledge within the firm. Yet respondents often noted that no steps were taken to address the concerns, for example:

> *Other associates were afraid of working with the same person who had bullied me. Everyone already knew this person was a problem and firm had chosen not to do anything about it.*

Another respondent described the importance of shared behaviors in an atmosphere where reporting was not an option:

> *All of the women in the office knew that certain departments were a minefield and we all tried to work around it.… When does the firm become responsible for its persistent problems in not properly addressing the behavior?*

In some instances, respondent stated that friends at work discussed being bullied or propositioned, but did not report the behaviors:

> *The incidents weren't disturbing enough to report.*

A respondent commented on involvement in an investigation of a senior partner who made sexual overtures to young women:

> *There was a formal investigation. Senior partner – man – had clearly engaged in alleged behavior. The firm did more to keep young women away from him but there was no loss of stature for this person.*

One respondent offered a glimpse into the behaviors that colleagues endure and the varied responses:

> *Stressed, overworked, and/or unhappy partners demeaning others, not privately. I console and counsel them, sometimes report to HR, sometimes confront perpetrator.*

Another respondent followed up after young women expressed annoyance with the leering behaviors of male partners:

> *I spoke with a female partner on the firm's management committee. Not sure if anything happened but tend to doubt it.*

Some respondents intervened and described positive results. One explained the follow up after a female associate shared comments made to her by a partner about her appearance:

> *I went to the senior partner, who was the offender, and told him that his behavior and comments were inappropriate and offensive, that he was not to make any further comments of that nature, and that he was to apologize to the associate.*

A respondent was told by an intern of a partner's sexual comments. The respondent spoke with the managing partner who took immediate action against the partner. Another sought and received permission to report a colleague's experiences of being bullied.

One respondent offered an example of a reporting process that worked in response to a partner's inappropriate joking:

> *As a member of the firm's Management Committee I responded to the associate's complaint, reached out to the Partner in charge … and confirmed that the firm's sexual harassment committee would address the complaint. I received confirmation that the associate was satisfied with the committee's response and did not want to further pursue the complaint.*

In another example, a respondent stated that a colleague expressed concern about someone in the office making a racially discriminatory comment. The respondent noted:

> *I reported this to HR … and to a member of the firm's Diversity Committee. HR and the member of the Diversity Committee had follow-up conversations with the [person who raised the concerns].*

One respondent described supporting a colleague who reported inappropriate comments made by men in the firm:

> *She reported it, I supported her, and we addressed this generally in anti-harassment training at the firm.*

A respondent highlighted a number of ways of responding to concerns:

> *Our firm has a code of conduct – mostly unwritten originally, but more formal now. We have also mentors for attorneys and supervisors for staff, as well as currently formal HR procedures. On an irregular basis, associates, partners, paralegals, and support staff speak to me about concerns. I counsel them on how to deal with the concerns. Sometimes I intercede. Sometimes I initiate involvement by our HR folks. In egregious situations, or repeated situations, I go to HR…. In some situations, I raise the issue during evaluations. In some situations, I discuss the situation with another colleague. In some situations, I have a one-on-one meeting with the individual who caused the situation.*

12) At the time of any incident(s) described above, did the firm have a process for reporting behaviors of concern?

The respondents provided a range of responses that lend greater insight to the challenges that firms face in addressing the issues identified in this survey. Only slightly more than one-third of the respondents to this question said that, at the time of incidents described in other responses to this survey, their firm had a process for reporting behaviors; approximately 20% said their firms did not. Of particular interest, close to half did not know whether the firm did or did not have a reporting process at the time.

QUESTION 12	Percentage
Yes	35.14%
No	19.2%
Don't Know	45.65%

Many respondents reported that they had a sexual harassment policy made available to all, but did not further describe a process for resolving complaints. Others, as noted below, highlighted a variety of initial reporting mechanisms, but did not provide a description of the subsequent steps that would be taken after the report is made. It is, however, understandable that respondents to a survey would only provide minimal detail in response to an open-ended question.

For example, many said the firm had a committee to which complaints about inappropriate workplace conduct can be reported. Others stated that the firm had in place a rapid response team for such matters, and a few said the firm had an ombudsman to whom any type of matter could be reported.

Several said that complaints were to be directed to specific named supervisors or to the Human Resources Department. Some respondents noted that they had designated partners to address complaints. Others required reports to be made to practice group leaders or to the managing partner. A few respondents said that reports could be made to anyone in the firm with whom the complainant felt comfortable.

Some respondents indicated that the firm offered a number of different avenues for bringing concerns forward, for example:

> *We have always had a process for reporting violations of firm policy, including anti-discrimination and anti-harassment policies, which provided multiple routes for reporting. Also there has always been a strict anti-retaliation policy.*

Another respondent created an alternative where the firm's process did not provide a point of contact that felt comfortable:

> *The process was to speak to the Managing Partner or another designated partner at the time. I was new to the firm and did not feel comfortable with either partner, so I went to a partner who I felt more comfortable with.*

One respondent observed a discrepancy between firm policy and practice that should be cautionary to others:

> *It's on paper, but in reality … we know what the reality was. Partners would go for "sensitivity training." After they came back, they were deemed "cleaned up" until they did it again. It created a laissez faire top down culture.*

13) If you are currently working in a law firm, does the firm have an internal process for reporting behaviors of concern?

As with responses to question 12, a significant number of respondents did not know if their firm has an internal process for reporting.

QUESTION 13	Percentage
Yes	47.62%
No	13.16%
Don't Know	39.20%

The responses to question 13 were similar to the responses to question 12. Respondents described a variety of reporting avenues within the firm that included one or a combination of: managing partners, management committees, standing committees or other designated groups for addressing complaints, HR departments, practice group leaders, firm administrators, specific partners, and office managers. In a few instances, respondents stated that a reporting mechanism was through partner mentors or other trusted partners.

Few respondents provided information about what happens after a complaint is made. In one instance, the respondent expressed concern about the designated individual:

> *The process involves speaking to the head of the non-attorney staff. However, I am not aware that she ever did anything to address any of the … behaviors, and her judgment is suspect.*

In a couple of other examples, however, the respondent expressed a more positive view of the process, for example:

The behavior would be reported to HR who would then handle the situation. We have a zero tolerance policy so presumably, that person would be fired if found true.

Another stated:

There is a standing committee with a variety of individuals (different genders, sexual orientations, positions in firm, etc.) who you can report any incident to. A discussion is held as to consequences. Any concerns are raised to the executive committee. Then actions are considered based on the victims' wishes and the firm's policies.

Recommendations

Consistent with what is reported in the media about other workplace settings, inappropriate behaviors remain an ongoing challenge in law firms as well. The survey results further demonstrate that these behaviors are a particular challenge for young women entering the work force. Moreover, unchecked power imbalances can leave those who serve in subordinate roles vulnerable to a range of negative behaviors.

We cannot know how many careers have been thwarted by workplaces that allow – through tacit acceptance, willful ignorance, or simply neglect – negative behaviors to continue unrestrained. We do know, however, that the results can be devastating to careers and economically harmful to those organizations that leave themselves vulnerable to disengaged and distracted employees, rampant turnover, and possible lawsuits.

Every law firm has an obligation to provide a culture in which people can do their jobs in a safe and respectful environment. The following recommendations offer a road map towards achieving that result.

1. **Engage leadership in creating a positive firm culture that treats all with civility and respect.**
   Cultural change in an organization is impossible without direct leadership engagement. Even when leaders are, or profess to be, unaware of negative behaviors, employees generally assume they have full knowledge. Survey respondents frequently described circumstances in which employees warned each other of those who should be avoided, or grumbled quietly about the latest transgressions. Their frustration was compounded by a belief that the behaviors were known to those in leadership, just as they were known to others in the organization; otherwise, they assumed, victimizers would have been stopped.

   Leaders have an obligation to understand all aspects of their workplace culture. In particular, they need to learn whether there are negative behaviors to address. Failure to do so can be costly to the organization – resulting in low morale, perpetuating a climate of fear, accelerating turnover, negatively impacting the firm's reputation, and potentially risking litigation.

2. **Implement measures to hold all firm leaders accountable for the behaviors of those they supervise or manage.**
   Meaningful change requires accountability. Organizations use metrics to track that which is important. Just as firms track billable hours, originations, and collections, they should also track reports of negative behaviors, attrition rates by department and office location, and other indicia of ways in which workplace culture impacts morale, engagement, and productivity.

3. **Undertake an internal self-assessment to determine areas of particular challenge.**
   The survey demonstrated that many workplaces have areas of vulnerability, for example, employees (including Partners) who may pose particular challenges in how they treat others, practice groups where incivility – or worse – is tolerated, star performers who engage in bullying tactics, or Partners who may be exerting control in ways that demean others. Some workplaces fail to address a culture where fear and stress are taking an emotional and financial toll. The challenges differ from firm to firm; an internal assessment designed to produce honest feedback can help identify measures that can be implemented to improve culture.

   Toward that goal, firms should engage in a process to solicit confidential feedback from employees and

Partners. An assessment can be conducted in a variety of ways, including as a survey or a series of confidential conversations. To ensure interviewees and/or survey respondents can provide information openly and confidentially, the firm could engage a neutral, independent party to conduct the assessment. Based on the findings, the firm can develop both short-term and long-term goals for improving culture and strengthening relationships among colleagues.

4. **Develop a comprehensive policy that does not hide behind strict definitions.**
The questions asked in this survey purposefully reached beyond a legal definition of sexual harassment. The intent was to more fully identify a variety of behaviors that could have an impact on firm culture and employee engagement.

   There is a high cost paid by those who are subjected to the behaviors of fellow workers who demean, disparage, or insult others, whether that treatment is against individuals or particular groups. In several of the anecdotal responses provided, the respondents who did report such behaviors were told that the words or actions did not violate policy or meet a specific legal definition of, for example, sexual harassment.

   Firms should not erect barriers that require a legal definition to be met before they can respond to behaviors that undermine a culture of civility and respect. Law firms should set boundaries around behaviors that are deemed unacceptable, regardless of whether they are legally actionable.

5. **Consider an independent process for reporting.**
It is clear from this survey, as well as countless media stories, that a safe reporting process, free of retribution or other negative consequences, is absolutely essential. Many firms offer avenues of reporting to senior leaders, an HR department, or other designated individuals or groups. As many respondents demonstrated, however, these mechanisms do not always work. Moreover, based on the responses to this survey, a reporting process that is directed solely to a firm's Human Resources Department is insufficient. HR Departments, no matter how well-meaning, may have conflicting loyalties when individuals come forward with information that may have negative consequences for the organization itself.

   Firms should consider adding to their internal reporting processes an opportunity to report to an independent person who is separate from the firm's existing hierarchy.

6. **Be clear about lines of authority and extent of responsibilities.**
Many of the survey respondents wrote that they had spoken with their Human Resources Department about incidents of concern, but nothing happened. In some cases, they may not have been informed of any follow up. In many instances, however, they were told to either ignore the person, or the behaviors, or that nothing could be done. Sometimes, the HR response was to be protective of the organization.

   It is reasonable for younger employees in particular to expect that HR departments will address workplace behaviors. Leaders should be clear as to the limitations on the HR Department to become involved in or otherwise follow up on reports about, in particular, the behaviors of partners or other senior leaders.

7. **Make sure everyone is informed about the existence of a firm's policy and reporting process.**
The fact that nearly half of the respondents did not even know whether their firm had a policy for reporting suggests ample room for improving a law firm's communications about its policies and procedures for addressing complaints about workplace behaviors. Law firms should distribute regular reminders about their policies and the related process for reporting and follow up.

8. **Develop a process to encourage reporting and then provide ongoing support and information to those who do so.**
   Respondents frequently wrote that they spoke with their HR Department about negative behaviors, but then asked that their conversation remain off-the-record and confidential. This reflects the fear and discomfort felt by the individual, yet can leave the firm powerless to respond appropriately without the complainant's willingness to participate further in an investigatory process.

   Supporting those who have been the victims of inappropriate behaviors is a critical part of the process. It is not enough to have a process in place to conduct an investigation or otherwise respond to reports without a parallel process for supporting those who come forward.

9. **Look for patterns of behavior.**
   Too often, both victims of negative behaviors and others in the firm try to find consolation in the notion that the witnessed behavior is not part of a pattern. But it is incumbent on the firm to investigate each incident and to look for patterns as part of that investigation.

   A striking aspect of the survey responses is how infrequently formal reports were made within the reporting hierarchy of the firm (to the extent one existed), even as information was shared with colleagues, including partners. It is important to ask, however, whether that informal sharing of information served as an unsatisfactory alternative to the preferred result of an institutional response. Such a result can be greatly facilitated by the collection of information that helps identify individuals who engage in patterns of improper behaviors. At least in that way, shared information can assist in identifying offenders who have impacted multiple people.

   Accordingly, workplaces need to develop a system for collecting information about behaviors that are detrimental to the firm and that are not in keeping with the values and ethical constructs of the legal profession.

10. **Do not force face-to-face interactions between a person who reports and the person being reported.**
    To properly provide support throughout an internal process, it is important to avoid steps that emphasize the imbalance of power generally existing between those who report behaviors of concern and those who are the subject of such a report. Several respondents noted that, subsequent to reporting, they were required to meet directly with the alleged perpetrator to discuss the accusations. None of these meetings had support mechanisms in place for the reporting individual including, for example, a neutral party who could facilitate a positive conversation. In fact, some described the atmosphere of these meetings as punitive and a reinforcement of the power imbalance.

    It is hard enough for someone to take the step of reporting. What follows within the organization should be a process in which the individual feels safe in the workplace and supported through each phase of the investigation. A forced meeting in which the only other attendees are part of the firm's power structure is a setting designed to intimidate someone already feeling victimized. The result is to further discourage reporting.

11. **Commiseration is not a strategy.**
    As noted, a large number of respondents to this survey felt they could not formally report the offending behaviors but, instead, spoke with supportive colleagues. While it is important to be able to have trusted colleagues at work to whom one can speak confidentially about sensitive topics, this approach generally will not help the individual's circumstances, and will certainly not bring about any positive change.

    People share negative stories in the workplace for several reasons, including affirmation that they did not deserve what they experienced, comfort for what they are feeling and, importantly, finding hope that somehow the behavior will change. Those who hear stories of improper behaviors in the workplace should have an opportunity to respond in a way

that is not simply comforting to the victim's feelings, but can result in corrective measures being taken.

Many respondents who were reluctant to report provided ample reasons for being fearful. Certainly there are some situations where the behaviors are so untenable, and the likelihood of a positive resolution so remote, that leaving is an appropriate response. But in every circumstance, it is important to ask whether there can be a process beyond sharing stories with trusted colleagues, if only to help pave the way for future employees to avoid the same pain.

12. **Avoidance is also not a strategy.**
When partners are engaging in inappropriate behaviors, the response should not be to propose that the perpetrator and the person aggrieved by the behaviors simply be separated physically. Several respondents reported being moved away from a harasser or bullying partner, without the firm addressing the root cause of the problem. Not only do such measures fail to change firm dynamics overall, they also may impact the types of future work assignments given to the victim and can impede other career opportunities through loss of proximity to a practice group and to supportive peers, as well as possible decreased visibility to key partners.

In many cases, avoidance as a strategy is not even possible because of the underlying working relationship. For example, are young lawyers supposed to steer clear of partners who may have been abusive or have otherwise engaged in inappropriate behavior, but who are an important source of work? What would prevent further negative career impacts? And why should the responsibility fall on the victim to make the required adjustments?

Firms need a variety of appropriate responses to address the range of behaviors that were identified in this survey. Those responses, however, cannot include actions that only impact the person feeling victimized.

13. **Vigilantly prevent retaliatory behaviors.**
Retaliation can be blatant or more subtle. The blatant forms are easily observable, for example, whether a complainant is fired or partners stop assigning work to someone who raises concerns. But there are many more subtle ways in which a person's career can be damaged through less obvious retaliatory behaviors. For example, a person can be socially ostracized, excluded from client opportunities, or not given high value work, just to name a few ways. Firms should include in their process a way to monitor subsequent behaviors towards those who file reports to prevent any form of retaliation.

14. **Beware of "Death By A Thousand Cuts."**
Many of the anecdotes reported demonstrated the pernicious way in which humor is used as a sword and a shield. Such remarks inflict damage over time through frequent cuts to those who are victimized by the comments, while offering the protective shield of "It's just a joke" to the perpetrators – who then accuse complainants of lacking a sense of humor.

Humor that denigrates others is not funny. Individuals should be free to go to work without facing offensive comments justified as jokes, and then made to feel badly for not laughing.

15. **Develop training techniques for and encourage implementation of bystander intervention.**
Bystanders who observe inappropriate behaviors have an important opportunity to give voice to someone who may feel voiceless, or to amplify a rebuke to what is transpiring. One respondent who has been in the workplace for several decades noted that she now plays an active role in helping to stop conversations that are veering into a negative direction by simply stating "That's inappropriate" or "None of your business."

There are many forms of bystander intervention that can help make a difference, and firms can offer training to teach employees constructive strategies for such intervention.

16. **Resist backlash attempts against the #MeToo Movement.**
    A number of respondents told of remarks made by partners that denigrated or complained about the #MeToo Movement, even including comments that they can no longer "get away with" what they could previously. These remarks mirror the undercurrent of resistance that has been identified in other workplace settings, manifesting in objections to the symbolic importance of #MeToo as providing a voice to those who have previously felt voiceless.

    One concern that appears with increasing frequency is whether the #MeToo movement will inhibit regular interactions between men and women, including mentoring. As the anecdotes offered by the survey respondents make clear, however, such comments are a decoy, directing attention away from the real and compelling need to bring workplace behaviors to light.

    None of the survey respondents complained that someone may have complimented their outfit. They did raise many concerns about leering remarks and comments specifically directed to their chest or other personal parts of their body.

    Nor did female respondents complain about positive relationships they have developed with their male colleagues. Rather, they focused on men who sought mentoring meetings in bars or in hotel rooms while on work trips.

    People being kind to and complimenting one another is not unacceptable behavior. Remarks, however, that are clearly sexual in nature or that, at their core, reinforce the power imbalance in the workplace should not be tolerated.

17. **Consider Curbs on Social Drinking at Firm-Sanctioned Social Gatherings.**
    So many respondents provided anecdotes in which inappropriate behaviors occurred at a holiday or other social gathering in which the perpetrators were clearly inebriated. Law firms should consider ways to curb excessive drinking at firm-sponsored social events.

Conclusion

The survey yielded several striking findings. First – and no surprise when the survey is viewed in comparison to other organizations, corporations, and industries – is that the majority of the negative behaviors described arose from those in authority who misused their power. Nearly all of the anecdotes reported described events that happened to younger people, where the perpetrator was more senior and, frequently, among the more powerful persons in the firm.

In such circumstances where the source of the negative conduct was a senior partner or firm leader, there was no place for the victim to turn for support or remedial measures. Fear of retaliation and concern about loss of status and opportunity to advance within the firm loomed large.

As noted previously, a few respondents seemed resigned to a profession where humiliation was acceptable and a sink or swim culture an appropriate way to train lawyers. Those comments demonstrate how behaviors in the workplace are learned, and how culture is perpetuated. It would be difficult to find a book for organization leaders that extols humiliation and bullying as a technique for success in the workplace.

Law firm partners are often placed in leadership roles as a result of their client development and lawyering skills. Talent development and management of people are not necessarily part of that same skill set. Accordingly, firms may choose to consider management courses for all of its leaders, to facilitate skill sets that bring out the best from those who come to work each day, wanting only to serve the firm's clients and live the best values of the legal profession.

We hope that lawyers see in this survey a way to help facilitate a culture of civility, respect, and inclusion.